

In the Supreme Court of the United States  
October Term, 1980

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,  
Petitioners

v.

ITT WORLD COMMUNICATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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\*The opinion of the court of appeals, the opinion of the district court, and the order of the Federal Communications Commission denying respondent's petition for rulemaking are printed in the appendix to the petition for writ of certiorari and have not been reproduced here.

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

## CIVIL ACTION 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

## RELEVANT DOCKET ENTRIES

1980	
Feb 12	COMPLAINT appearance
Feb 12	FIRST request by pltf for production of documents
Feb 12	FIRST set of interrogatories by pltf to deft
Feb 12	REQUEST by pltf for appointment of special process server and Order by Clerk appointing Laurie E Londoner to serve summons and complaint upon deft, Attorney General and US Attorney
Feb 12	SUMMONS (3) and copies (3) of complaint issued
Feb 14	AFFIDAVIT of service on deft, US Atty and Atty Gen by mail on 2-12-80
Feb 20	AFFIDAVIT of service on U.S. Atty on 2-19-80.
Feb 20	REQUEST by defts for hearing in accordance with the schedule set forth in the Pretrial Order of 11-13-79, defts motion for summary judgment.
Mar 21	STIPULATION extending defts time to respond to complaint and first set of interrogatories and first request for production of documents to 4-21-80, so ordered. (FIAT)(N) Robinson, J.
Apr 21	MOTION by deft for enlargement of time and P&A's in support thereof.
Apr 21	ANSWER by deft to complaint; exhibits A,B, and C.
Apr 21	CALENDARED CD/N
Apr 23	SUPPLEMENTAL memorandum by deft to motion for enlargement of time.
Apr 25	ORDER filed 4-22-80 extending defts. time to respond to interrogatories and request for production of documents to 4-25-80. (N) Robinson, J.

May 9 STATUS report by deft.

May 13 RESPONSE by deft to pltff's first set of interrogatories. "Leave to file granted." (FIAT) Robinson, J.

May 22 MOTION by pltf. for an order to compel discovery; memo of P&A's exhibits A and B.

May 27 ORDER filed 5-22-80 that deft. shall file its dispositive motion on or before May 31, 1980. (N) Robinson, J.

June 2 MOTION by deft. for a protective order pending resolution of a dispositive motion.

June 2 MOTION by deft. to dismiss or, in the alternative, for summary judgment; memo of P&A's; exhibits A-I.

June 3 NOTICE by deft. of filing; table of contents; table of authorities; exhibit J.

June 16 MOTION by pltf. for enlargement of time and P&A's in support thereof.

June 16 REPLY memorandum of P&A's by pltf. in support of motion to compel discovery and in opposition to defts. motion for a protective order.

June 26 ORDER filed 6-24-80 granting defts. motion for protective order. Plaintiff to file opposition to motion to dismiss by 7-21-80. (N) Robinson, J.

July 24 STIPULATION of parties with approval of the Court extending to and including July 28, 1980 for pltf. to file opposition to defts. motion to dismiss. (FIAT)(N) Robinson, J.

July 28 MOTION by pltf. for summary judgment, or in the alternative, for in camera inspection of documents on its second claim for relief and for summary judgment on its third claim for relief; exhibits A-D; statement of material facts; affidavit of Grant S. Lewis.

July 28 MOTION by pltf. for leave to file a memo of P&A's in excess of page limitation; exhibit.

Aug 6 ORDER filed 8-1-80 granting pltfs. motion to file memorandum of P&A's in excess of page limitation. (N) Robinson, J.

Aug 6 MEMORANDUM of P&A's by pltf. in support of pltfs. motion for summary judgment and in opposition to defts. motion to dismiss or for summary judgment.

Aug 8 STIPULATION granting deft. until 8-18-80 to serve response to motion for summary judgment; so ordered. (fiat) (N) ROBINSON, J.

Aug 19 STIPULATION granting deft. until 9-4-80 to oppose motion for summary judgment; pltf. to reply by 9-26-80, so ordered. (FIAT) Robinson, J.

Sept. 10 MOTION by deft. for enlargement of time to 9-11-80 within which to file opposition to pltfs. motion for summary judgment.

Sept. 12 MEMORANDUM of P&A's by deft. in opposition to pltfs. motion for summary judgment, and defts. opposition to pltfs. statement of material facts.

Sept. 15 ORDER filed 9-10-80 extending defts. time to reply to motion for summary judgment to 9-11-80. (N) Robinson, J.

Sept 29 STIPULATION that pltfs. reply memorandum in support of its motion for summary judgment to be served by 10-6-80; so ordered. (FIAT)(N) Robinson, J.

Oct 6 REPLY memorandum of P&A's by pltf. in support of pltfs. motion for summary judgment; exhibit A.

Oct 22 MEMORANDUM OPINION filed 10-17-80. (N) Robinson, J.

Oct 22 ORDER filed 10-17-80 granting defts. motion to dismiss Count I of complaint; granting pltfs. motion for summary judgment on counts II and III; deft. to disclose to pltf. certain documents within 10 days; pltf. to file its motion for attorney's fees within 30 days. (N) Robinson, J.

Oct 23 MOTION by deft. for stay of order pending appeal; memo of P&A's; exhibit 1.

Oct 24 SECOND set of interrogatories by pltf. to deft.

Oct 24 SECOND request by pltf. for production of documents.

Oct 24 MEMORANDUM of P&A's by pltf. in opposition to defts. motion for a stay pending appeal.

Oct 24 NOTICE of appeal by deft. from order of 10-17-80. Govt. no fee. Copy mailed to Eugene R. Fidell.

Oct 27 COPY of notice of appeal and docket entries transmitted to USCA. USCA #80-2324.

Oct 24 MOTION by deft for stay of Order of 10-17-80 pending appeal, argued and taken under advisement. (Rep: R. Weber) Robinson, J.

Oct 29 ORDER filed 10-24-80 amending Order of 10-17-80; granting defts. motion for stay of disposition of Count II and denying defts. motion for stay of disposition of Count III. (N) Robinson, J.

Oct 29 AMENDED notice of appeal by pltf. Govt. no fee. Copy mailed to Grant S. Lewis and Eugene R. Fidell, attachment.

Oct 29 COPY of notice of appeal and docket entries transmitted to USCA. USCA #80-2324.

Nov 3 TRANSCRIPT of proceedings of 10-24-80, pages 1-42. (Rep: R. Weber); Court copy.

Nov 14 NOTICE of cross appeal by pltf. from order of 10-17-80. \$70.00 paid and credited to U.S. Copy mailed to Surell Brady and to John Greenspan.

Nov 14 COPY of notice of appeal and docket entries transmitted to USCA. USCA #80-2401.

Nov 20 RECORD on appeal delivered to USCA; receipt ackn.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1721

ITT WORLD COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSIONER, RESPONDENT

[PETITION FOR REVIEW OF AN ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION]

## RELEVANT DOCKET ENTRIES

(C)06-30-80 4-Petitioner's petition for review of an order of the FCC (m-30)

(C)07-01-80 Certified copy of petition for review mailed to FCC & Attorney General

(T) 07-30-80 4-Motion of RCA Global Communications, Inc. for leave to intervene (m-30)

(T)08-05-80 4-Motion of Southern Pacific Communications Company for leave to intervene (m-5)

(B)08-08-80 Clerk's order that the motions of (1) Southern Pacific Communications Company ("SPCC") and (2) RCA Global Communications, Inc. (RCA Globecom) for leave to intervene are granted

(T)08-11-80 Certified Index to Record (n-5)

(T)09-03-80 4-Petitioner's motion to defer briefing (m-3)

(B)09-23-80 Clerk's order that the time for filing petitioner's initial brief is extended until 40 days after the District Court has entered its final decision concerning certain pending motions in that Court in ITT World Communications, Inc. v. FCC, Civil Action No. 80-0428. Counsel for petitioner shall advise the Court, through its Clerk, the status of the aforesaid matter within 60 days from the date of this order and, if necessary, at 60 day intervals thereafter

(T)11-26-80 4-Petitioner's motion for consolidation with Nos. 80-2324 and 80-2401 and to establish a briefing schedule (m-25)

(T)12-05-80 4-FCC's response to motion for consolidation and to establish a briefing schedule (m-5)

(T)12-15-80 4-Petitioner's reply in support of motion for consolidation and to establish briefing schedule (m-12)

(B)01-02-81 Order per CJ Wright that the Clerk is directed to schedule this case for argument on the merits on the same day and before the same panel which considers the appeal and cross-appeal in docket Nos. 80-2324 and 80-2401; and that the time for filing petitioner's brief is extended for a period of 40 days from the date of this order. The remaining briefs shall be filed in accordance with Rule 31(a) F.R.A.P. Intervenors' briefs shall be deferred 15 days after the brief is filed by the principal party they support if a notice of filing by intervenor is submitted on or before the date petitioner's or respondent's brief is filed. Only in that event will the time for filing the next brief required under Rule 31(a), F.R.A.P. be enlarged to accommodate that deferred filing. Counsel for the parties may utilize fully the provisions of Rule 28(i), F.R.A.P. with the briefs filed in the appeal and cross-appeal in Nos. 80-2324 and 802401.

(A)2-10-81 4-Petitioner's (ITT World Communications, Inc.) consent motion for extension of time to file its brief (m-10)

(B)02-18-81 Clerk's order granting petitioner's (ITT World Communications, Inc.) consent motion to extend time to file its brief to 2-17-81

(T)02-18-81 4-Petitioner's motion for leave to file brief in temporary form (m-17)

(T)02-18-81 4-Petitioner's motion for leave to file a brief in excess of page limitation (m-17)

(T)02-18-81 15-Petitioner's statutory appendix (m-17)

(T)02-18-81 7-Joint Appendix (m-17)

(B)02-20-81 Per Curiam order that appellant's (FCC) motion for stay pending appeal is denied and that appellant's motion to expedite is granted and the Clerk is directed to schedule this case for argument as soon after the filing of briefs as the business of the court permits; and that ITT World Communications, Inc., is granted leave to file in temporary form its brief in excess of the page limitations. This brief shall be considered filed in Nos. 80-1721, 80-2324 and 80-2401.

Robb, Wald and Ginsberg (who did not participate), CJs

(B)02-20-81 4-Petitioner's (ITT World Comm, Inc.) brief (m-17)

(R)2-26-81\* Per Curiam order that the motion to strike the brief is denied; Robb, Wald and Ginsburg, Circuit Judges Circuit Judge Ginsburg did not participate in the foregoing order

(R)2-26-81 4-Respondent's opposition to motion for leave to file brief in excess of page limit and cross motion to compel compliance with orders of 1-2-81 (m-20)—filed per order above

(T)03-09-81 15-Petitioner's (ITT World Comm, Inc.) brief (m-3)

(T)03-11-81 4-Respondent's (FCC) motion to extend time to file brief to April 6, 1981 (m-11)

(C)03-16-81 4-Petitioner's response to FCC's motion to extend time to file brief (m-16)

(T)03-27-81 4-FCC's motion to extend time to file brief to June 5, 1981 (m-27)

(B)04-14-81 Order per CJ McGowan that the time for filing respondents' brief is extended to and including June 5, 1981

(T)05-26-81 4-Joint motion to defer briefing schedule (m-26)

(B)06-01-81 Clerk's order granting the joint motion to defer briefing schedule and the filing of briefs herein is deferred pending the outcome of settlement negotiations among the parties. Respondent shall report to the Court on the progress of negotiations within 45 days from the date of this order and at 60 day intervals thereafter, if necessary.

(V)07-15-81 4-FCC's status report (m-15)

(T)09-14-81 4-FCC's status report (m-14)

(V)11-13-81 4-Letter from counsel for respondent confirming the statement made by FCC in their status report (m-13)

(V)11-13-81 4-FCC's status report (m-13)

(V)11-16-81 Letter dated 11/12/81 from counsel for petitioner advising of status

(B)12-01-81 Order per CJ Robinson that the briefs of the FCC and the Department of Justice be filed not later than January 15, 1982. All briefs in reply shall be filed not later than March 1, 1982.

(V)01-15-82 4-FCC's motion for two-working-day extension of time to file brief (m-15)

(B)01-19-82 Order per CJ Robinson that respondents' brief(s) may be filed by the close of business January 19, 1982.

(C)01-27-82 15-Respondents' brief (m-19)

(V)02-05-82 15-Respondents' corrected brief (m-2)

(V)03-02-82 15-Petitioner's reply brief (m-1)

(B)04-09-82 Clerk's order, *sua sponte*, that the following times are allotted for the oral argument of this case: Petitioner—15 minutes; Respondents—15 minutes. Only one counsel per side will be allowed to argue.

(C)04-13-82 4-Letter from counsel for petitioner advising of additional authorities pursuant to FRAP 28(j) (m-12)

(C)04-16-82 ARGUED BEFORE SCJ Bazelon and Tamm and Mikva, CJs

(C)06-16-82 4-Letter from counsel for petitioner advising of additional authorities pursuant to FRAP 28(j) (m-15)

(C)06-21-82 4-FCC's motion to strike petitioner's 28(j) letter filed 6/16/82 (m-17)

(C)06-21-82 4-FCC's motion for leave to file response to letter discussing additional authorities (m-21)

(V)07-07-82 Per Curiam order that the motion to strike is denied; and that the motion for leave to file responses is granted and the Clerk is directed to file the lodged memorandum of the FCC responding to ITT's letter discussing additional authorities; SCJ Bazelon, Tamm and Mikva, CJs

(T)09-17-82 4-Letter from counsel for FCC advising of additional authorities pursuant to FRAP 28(j)(m-16)

(B)02-01-83 Opinion for the Court filed by Senior Circuit Judge Bazelon

(B)02-01-83 Mandate Order

(B)02-01-83 Judgment affirming in part, reversing in part and remanding the case to the District Court for further consideration and findings, all in accordance with the opinion of this Court filed herein this date.

(J)02-14-83 4-Petitioner's bill of costs (m-11)

(J)03-18-83 15-Respondent's (FCC) petition for rehearing and suggestion for rehearing en banc (m-18)

(V)04-06-83 Per curiam order that respondent's petition for rehearing, filed 03/18/83, is denied; Tamm and Mikva, CJs and SCJ Bazelon

(V)04-06-83 Per curiam order, en banc, that respondent's suggestion for rehearing en banc is denied; CJ Robinson, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, CJs (Circuit Judges MacKinnon, Bork and Scalia would grant the suggestion for rehearing en banc) (Circuit Judge Wald did not participate in the foregoing order)

(S)04-14-83 Certified copy of opinion and judgment issued to Federal Communications Commission. Cost to issue at a later date.

(V)04-25-83 Per curiam order that costs in the total amount of \$3,246.47 are awarded in favor of petitioner/cross-appellant (ITT World Communications, Inc.) and taxed against respondents/appellees (FCC and USA), jointly and severally. The Clerk is directed to transmit a certified copy of this order to the FCC as promptly as the business of his office permits; Tamm and Mikva, CJs and SCJ Bazelon

(V)04-25-83 Certified copy of above order sent to FCC

(J)07-06-83 Copy of letter from Clerk, Supreme Court dated 07-05-83 extending time to file petition for writ of certiorari to 09-03-83 in SC No. A-1042

(J)09-20-83 Notice from Clerk, Supreme Court advising that petition for writ of certiorari was filed 09-02-83 in SC No. 83-371

(J)11-01-83 Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 83-371 on 11-31-83

(J)11-02-83 4-Letter dated 11-01-83 from Clerk, Supreme Court asking that record be certified and transmitted to Supreme Court

(J)11-07-83 Receipt dated 11-07-83 from Clerk, Supreme Court for certified record

(J)11-09-83 Letter dated 11-04-83 from Chief Deputy Clerk to Clerk, Supreme Court transmitting certified record

(J)11-09-83 Letter dated 11-08-83 from Chief Deputy Clerk to Clerk, Supreme Court enclosing certified copy of the judgment that was omitted from the file

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2401

ITT WORLD COMMUNICATIONS, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSIONER, APPELLEE  
[APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF COLUMBIA]

## RELEVANT DOCKET ENTRIES

(V)11-17-80 Copy of notice of appeal and docket entries from Clerk, District Court (n-2)

(V)11-17-80 Docketing fee was paid in the District Court on 11-14-80

(V)11-24-80 Certified Original Record (2 vols.); 1 vol. of Transcript under separate cover (n-3) (Also the record in 80-2324)

(T)11-26-80 4-Appellant's motion for consolidation with Nos. 80-1721 and 80-2324 and to establish a briefing schedule (m-25)

(T)12-05-80 4-FCC's response to motion for consolidation and to establish briefing schedule (m-5)

(T)12-15-80 4-Appellant's reply in support of motion for consolidation and to establish briefing schedule (m-12)

(B)01-02-81 Order per CJ Wright that the Clerk is directed to file FCC's opposition to the motion for consolidation and to establish a briefing schedule; and that the Clerk is directed to schedule these appeals (80-2324 and 80-2401) for argument on the same day and before the same panel with the petition for review proceeding in No. 80-1721; and that the time for filing plaintiff/cross-appellant's brief is extended for a period of 40 days from the date of this order. The further briefs in these cross-appeals shall be filed in accordance with Rules 28(h) and 31(a), F.R.A.P. utilizing fully the provisions of Rule 28(i), F.R.A.P. as to the briefs filed in No. 80-1721.

(B)01-02-81 4-FCC's opposition to motion for consolidation and to establish a briefing schedule (m-5)—filed per above order

(A)2-10-81 4-Appellant's consent motion for extension of time to file its brief (m-10)

(T)02-17-81 4-FCC's motion to expedite scheduling of oral argument (m-13)

(T)02-17-81 4-FCC's motion for stay pending appeal (m-13)

(B)02-18-81 Clerk's order granting appellant's (ITT World Communications, Inc.) consent motion to extend time to file brief to 2-17-81

(T)02-18-81 4-Appellant's emergency motion for extension of time in which to respond to FCC's motion for stay pending appeal (m-18)

(T)02-18-81 4-Appellant's motion for leave to take the deposition of Willard L. Demory (M-18)

(T)02-18-81 4-Appellant's motion for leave to file brief in temporary form (m-17)

(T)02-18-81 4-Appellant's motion for leave to file brief in excess of page limitations (m-17)

(T)02-18-81 15-Appellant's statutory appendix (m-17)

(T)02-18-81 7-Joint Appendix (m-17)

(B)02-20-81 Per Curiam order that appellant's motion for stay pending appeal is denied; and that appellant's motion to expedite is granted and the Clerk is directed to schedule this case for argument as soon after the filing of briefs as the business of the court permits; and that ITT World Communications, Inc., is granted leave to file in temporary form its brief in excess of the page limitations. This brief shall be considered filed in Nos. 80-1721, 80-2324 and 80-2401. Robb, Wald and Ginsburg (who did not participate), CJ's

(B)02-20-81 4-Petitioner's (ITT World Communications, Inc.) brief (m-17)

(T)02-20-81 4-FCC's motion to strike brief of ITT World Communications, Inc. (m-20)

(T)02-20-81 4-FCC's opposition to motion for leave to take the deposition of Willard L. Demory (m-20)

(T)02-20-81 4-FCC's opposition to emergency motion for extension of time in which to respond to FCC's motion for stay pending appeal (m-20)

(C)02-26-81 Per Curiam order that the motion to strike brief is denied; Robb, Wald and Ginsburg (who did not participate), CJs

(C)02-26-81 4-Respondent's opposition to motion for leave to file brief in excess, etc. (m-20). filed per above order

(T)03-09-81 15-Appellant's (ITT World Communications, Inc.) brief (m-3)

(C)03-10-81 4-FCC's motion to extend time to file brief to 4/16/81 (m-10)

(C)03-16-81 4-ITT's response to FCC's motion to extend time to file brief (m-16)

(T)03-7-81 4-FCC's motion to extend time to file brief to June 5, 1981 (m-27)

(B)04-14-81 Order per CJ McGowan that the time for filing the brief of FCC is extended to and including June 5, 1981

(T)05-26-81 4-Joint motion to defer briefing schedule (m-26)

(B)06-01-81 Clerk's order granting the joint motion to defer briefing schedule and the filing of briefs herein is deferred pending the outcome of settlement negotiations among the parties. Respondent shall report to the Court on the progress of negotiations within 45 days from the date of this order and at 60 day intervals thereafter, if necessary

(V)07-15-81 4-FCC's status report (m-15)

(T)09-14-81 4-FCC's status report (m-14)

(V)11-13-81 4-FCC's status report (m-13)

(V)11-13-81 4-Letter from counsel of DOJ confirming statement made by FCC in their status report (m-13)

(V)11-16-81 Letter dated 11/16/81 from counsel for appellant advising of status

(B)12-01-81 Order per CJ Robinson that the briefs of the FCC and the Department of Justice be filed not later than January 15, 1982. All briefs in reply shall be filed not later than March 1, 1982.

(V)01-15-82 4-Appellee's motion to extend time in which to serve and file brief, two working days (m-15)

(C)01-19-82 Order per CJ Robinson that appellee's brief(s) may be filed by the close of business January 19, 1982 (80-1721)

(B)01-22-82 Order per CJ Robinson that the Clerk is directed to file the lodged Commission's brief

(B)01-22-82 15-Appellee's brief (m-19)

(V)03-02-82 15-Appellant's reply brief (m-1)

(B)04-09-82 Clerk's order, *sua sponte*, that the following times are allotted for the oral argument of this case: Appellant—15 minutes; Appellee—15 minutes. Only one counsel per side will be allowed to argue.

(C)04-13-82 4-Letter from counsel for appellant advising of additional authorities pursuant to FRAP 28(j) (m-12)

(C)04-16-82 ARGUED BEFORE SCJ Bazelon and Tamm and Mikva, CJs

(C)06-16-82 4-Letter from counsel for appellant advising of additional authorities pursuant to FRAP 28(j) (m-15)

(c)06-21-82 4-FCC's motion to strike ITT's 28(j) letter filed 6/16/82 (m-17)

(C)06-21-82 4-FCC's motion for leave to file response to letter discussing additional authorities (m-21)

(V)07-07-82 Per Curiam order that the motion to strike is denied; that the motion for leave to file responses is granted and the Clerk is directed to file the lodged memorandum of the FCC responding to ITT's letter discussing additional authorities; SCJ Bazelon, Tamm and Mikva, CJs

(V)07-07-82 4-FCC's memorandum responding to letter discussing additional authorities (m-21)—filed per above order

(B)02-01-83 Opinion for the Court filed by Senior Circuit Judge Bazelon

(B)02-01-83 Mandate Order

(B)02-01-83 Judgement affirming in part, reversing in part and remanding the case to the District Court for further consideration and findings, all in accordance with the opinion of this Court filed herein this date.

(J)02-14-83 4-Appellant's bill of costs (m-11)

(J)03-18-83 15-Appellee's petition for rehearing and suggestion for rehearing en banc (m-18)

(V)04-06-83 Per curiam order that appellee's petition for rehearing, filed 03/18/83, is denied; Tamm and Mikva, CJs and SCJ Bazelon

(V)04-06-83 Per curiam order, en banc, that appellees' suggestion for rehearing en banc is denied; CJ Robinson, Wright, Tamm, MacKinnon, Wilkey,

Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, CJs (Circuit Judges MacKinnon, Bork and Scalia would grant the suggestion for rehearing en banc) (Circuit Judge Wald did not participate in the foregoing order)

(S)04-14-83 Certified copy of opinion and judgment issued to Federal Communications Commission. Costs to issue at a later date.

(V)04-25-83 Per curiam order that costs in the total amount of \$3,246.47 are awarded in favor of petitioner/cross-appellant (ITT World Communications, Inc.) and taxed against respondents/appellees (FCC and USA), jointly and severally. The Clerk is directed to transmit a certified copy of this order to the FCC as promptly as the business of his office permits; Tamm and Mikva, CJs and SCJ Bazelon

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(J)07-06-83 Copy of letter from Clerk Supreme Court dated 07-05-83 extending time to file petition for writ of certiorari to 09-03-83 in SC No. A-1042

(J)09-20-83 Notice from Clerk, Supreme Court advising that petition for writ of certiorari was filed 09-02-83 in SC No. 83-371

(J)11-01-83 Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 83-371 on 11-31-83

(J)11-02-83 Letter dated 11-01-83 from Clerk, Supreme Court asking that the record be certified and transmitted to Supreme Court.

(J)11-07-83 Receipt dated 11-07-83 from Clerk, Supreme Court for certified record

(J)11-09-83 Letter dated 11-04-83 from Chief Deputy Clerk to Clerk, Supreme Court transmitting certified record

(J)11-09-83 Letter dated 11-08-83 from Chief Deputy Clerk to Clerk, Supreme Court enclosing certified copy of the judgment that was omitted from the file

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2324

ITT WORLD COMMUNICATIONS, INC., APPELLEE

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

[APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF COLUMBIA]

## RELEVANT DOCKET ENTRIES

(V)10-29-80 Copy of notice of appeal and docket entries from Clerk, District Court (n-3)

(C)10-30-80 Notice from District Court containing amended notice of appeal

(V)11-24-80 Certified Original Record (2 vols.); 1 vol. of Transcript under separate cover (n-3) (Also the record in 80-2401)

(T)11-26-80 4-Appellee's motion for consolidation with Nos. 80-1721 and 80-2401 and to establish a briefing schedule (m-25)

(T)12-05-80 4-FCC's response to motion for consolidation and to establish briefing schedule (m-5)

(T)12-15-80 4-Appellant's rely in support of motion for consolidation and to establish briefing schedule

(B)01-02-81 Order per CJ Wright that the Clerk is directed to file FCC's opposition to the motion for consolidation and to establish a briefing schedule; and that the Clerk is directed to schedule these appeals (80-2324 and 80-2401) for argument on the same day and before the same panel with the petition for review proceeding in No. 80-1721; and that the time for filing plaintiff/cross-appellant's brief is extended for a period of 40 days from the date of this order. The further briefs in these cross-appeals shall be filed in accordance with Rules 28(h) and 31(a), F.R.A.P. utilizing fully the provisions of Rule 28(i), F.R.A.P. as to the briefs filed in No. 80-1721.

(B)01-02-81 4-FCC's opposition to motion for consolidation and to establish a briefing schedule (m-5)—filed per above order

(A)2-10-81 4-Appellee's consent motion for extension of time to file its brief (m-10)

(T)02-17-81 4-FCC's motion to expedite scheduling of oral argument (m-13)

(T)02-17-81 4-FCC's motion for stay pending appeal (m-13)

(B)02-18-81 Clerk's order granting appellee's (ITT World Communications, Inc.) consent motion to extend time to file brief to 2-17-81

(T)02-18-81 4-Appellee's emergency motion for extension of time in which to respond to FCC's motion for stay pending appeal (m-18)

(T)02-18-81 4-Appellee's motion for leave to take the deposition of Willard L. Demory (m-18)

(T)02-18-81 4-Appellee's motion for leave to file brief in temporary form (m-17)

(T)02-18-81 4-Appellee's motion for leave to file brief in excess of page limitations (m-17)

(T)02-18-81 15-Appellee's statutory appendix (m-17)

(T)02-18-81 7-Joint Appendix (m-17)

(B)02-20-81 Per Curiam order that appellant's motion for stay pending appeal is denied; and that appellant's motion to expedite is granted and the Clerk is directed to schedule this case for argument as soon after the filing of briefs as the business of the court permits; and that ITT World Communications, Inc., is granted leave to file in temporary form its brief in excess of the page limitations. This brief shall be considered filed in Nos. 80-1721, 80-2324 and 80-2401; Robb, Wald and Ginsburg (who did not participate), C.J.'s

(B)02-20-81 4-Petitioner's (ITT World Communications, Inc.) brief (m-17)

(T)02-20-81 4-FCC's motion to strike brief of ITT World Communications, Inc. (m-20)

(T)02-20-81 4-FCC's opposition to motion for leave to take the deposition of Willard L. Demory (m-20)

(T)02-20-81 4-FCC's opposition to emergency motion for extension of time in which to respond to FCC's motion for stay pending appeal (m-20)

(C)03-10-81 4-FCC's motion to extend time to file brief to 4/6/81 (m-10)

(C)02-26-81 Per Curiam order that the motion to strike brief is denied; Robb, Wald and Ginsburg, C.J. (CJ Ginsburg did not participate)

(C)02-26-81 4-Respondent's opposition to motion for leave to file brief in excess of page limit and cross-motion to compel compliance with orders of 1/2/81 (m-20)—filed per above order

(T)03-09-81 15-Appellee's (ITT World Communications, Inc.) brief (m-3)

(C)03-10-81 4-FCC's motion to extend time to file brief to 4/6/81 (m-10)

(C)03-16-81 4-ITT's response to FCC's motion to extend time to file brief (m-16)

(T)03-27-81 4-FCC's motion to extend time to file brief to June 5, 1981(m-27)

(B)04-14-81 Order per CJ McGowan that the time for filing the brief of FCC is extended to and including June 5, 1981

(T)05-26-81 4-Joint motion to defer briefing schedule (m-26)

(B) 06-01-81 Clerk's order granting the joint motion to defer briefing schedule and the filing of briefs herein is deferred pending the outcome of settlement negotiations among the parties. Respondent shall report to the Court on the progress of negotiations within 45 days from the date of this order and at 60 day intervals thereafter, if necessary.

(V)07-15-81 4-FCC's status report (m-15)

(T)09-14-81 4-FCC's status report (m-14)

(V)11-13-81 4-FCC's status report (m-13)

(V)11-13-81 4-Letter from counsel for DOJ confirming statement made by FCC in their status report (m-13)

(V)11-16-81 Letter dated 11/12/81 from counsel for appellee advising of status

(B)12-01-81 Order per CJ Robinson that the briefs of the FCC and the Department of Justice be filed not later than January 15, 1982. All briefs in reply shall be filed not later than March 1, 1982.

(V)01-15-82 4-Appellant's motion to extend time in which to serve and file brief, two working days (m-15)

(C)01-19-82 Order per CJ Robinson that appellants' brief(s) may be filed by the close of business January 19, 1982 (80-1721)

(B)01-22-82 Order per CJ Robinson that the Clerk is directed to file the lodged Commission's brief

(B)01-22-82 14-Appellee's brief (m-19)

(V)03-02-82 15-Appellee's reply brief (m-1)

(B)04-09-82 Clerk's order, *sua sponte*, that the following times are allotted for the oral argument of this case: Appellant—15 minutes; Appellee—15 minutes. Only one counsel per side will be allowed to argue.

(C)04-13-82 4-Letter from counsel for ITT advising of additional authorities pursuant to FRAP 28(j) (m-12)

(C) 04-16-82 ARGUED BEFORE SCJ Bazelon and Tamm and Mikva, CJs

(C)06-16-82 4-Letter from counsel for ITT World advising of additional authorities pursuant to FRAP 28(j) (m-15)

(C)06-21-82 4-FCC's motion to strike ITT's 28(j) letter filed 6/16/82 (m-17)

(C)06-21-82 4-FCC's motion for leave to file response to letter discussing additional authorities (m-21)

(V) 07-07-82 Per Curiam order that the motion to strike is denied; that the motion for leave to file responses is granted and the Clerk is directed to file the lodged memorandum of the FCC responding to ITT's letter discussing additional authorities; SCJ Bazelon, Tamm and Mikva, CJs

(V)07-07-82 4-FCC's memorandum responding to letter discussing additional authorities (m-21)—file per above order

(B)02-01-83 Opinion for the Court filed by Senior Circuit Judge Bazelon

(B)02-01-83 Mandate Order

(B)02-01-83 Judgment affirming in part, reversing in part and remanding the case to the District Court for further consideration and findings, all in accordance with the opinion of this Court filed herein this date.

(J)02-14-83 4-Appellee's bill of costs (m-11)

(J)03-18-83 15-Appellant's (FCC) petition for rehearing and suggestion for rehearing en banc (m-18)

(V)04-06-83 Per curiam order that appellant's petition for rehearing, filed 03/18/83, is denied; Tamm and Mikva, CJs and SCJ Bazelon

(V)04-06-83 Per curiam order, en banc, that appellant's suggestion for rehearing en banc is denied; CJ Robinson, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, CJs (Circuit Judges MacKinnon, Bork

and Scalia would grant the suggestion for rehearing en banc) (Circuit Judge Wald did not participate in the foregoing order)

(S)04-14-83 Certified copy of opinion and judgment issued to Federal Communications Commission. Costs to issue at a later date.

(V)04-25-83 Per curiam order that costs in the total amount of \$3,246.47 are awarded in favor of petitioner/cross-appellant (ITT World Communications, Inc.) and taxed against respondents/appellees (FCC and USA), jointly and severally. The Clerk is directed to transmit a certified copy of this order to the FCC as promptly as the business of his office permits; Tamm and Mikva, CJs and SCJ Bazelon

(V)04-25-83 Certified copy of above order sent to FCC

(J)07-06-83 Copy of letter from Clerk, Supreme Court dated 07-05-83 extending time to file petition for writ of certiorari to 09-03-83 in SC No. A-1042

(J)09-20-83 Notice from Clerk, Supreme Court advising that petition for writ of certiorari was filed 09-02-83 in SC No. 83-371

(J)11-01-83 Certified copy of order from Clerk, Supreme Court granting petition for writ of certiorari in SC No. 83-371 on 11-31-83

(J)11-02-83 4-Letter dated 11-01-83 from Clerk, Supreme Court asking that record be certified and transmitted to Supreme Court.

(J)11-07-83 Receipt dated 11-07-83 from Clerk, Supreme Court for certified record

(J)11-09-83 Letter dated 11-04-83 from Chief Deputy Clerk to Clerk, Supreme Court transmitting certified record

(J)11-09-83 Letter dated 11-08-83 from Chief Deputy Clerk to Clerk, Supreme Court enclosing certified copy of the judgment that was omitted from the file

LEBOEUF, LAMB, LEIBY & MACRAE  
140 Broadway  
New York, N.Y. 10005

October 12, 1979

Executive Director  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20551

**Re: REQUEST FOR INSPECTION OF RECORDS**

Dear Sir:

On behalf of our client, ITT World Communications Inc., we hereby request, pursuant to the provisions of 5 U.S.C. § 552, copies of all correspondence, memoranda, records, minutes and other documents which refer or relate to:

1. Communications (whether or not occurring at a formal meeting) or possible communications involving FCC commissioners and/or staff personnel and representatives of foreign administrations and/or entities attending the recent US/CEPT/TELEGLOBE meeting in Dublin with respect to dealings or possible dealings between foreign correspondents and U.S. carriers not now providing international services through direct connections with foreign correspondents;
2. Communications or possible communications involving FCC commissioners and/or staff personnel and any person (whether American or foreign) with respect to dealings or possible dealings between foreign correspondents and U.S. carriers not now providing international services through direct connections with foreign correspondents;
3. The willingness of foreign correspondents to deal with or consider dealing with U.S. carriers not now providing international services through direct connections with foreign correspondents.

Pleadings filed in proceedings to which ITT World Communications Inc. was a party or opinions rendered in such proceedings need not be furnished.

It is our belief that none of the documents requested are of the kind described in 47 C.F.R. § 0.457. If any docu-

ments are withheld in reliance on that or any other provisions, we should appreciate it if the documents were identified with sufficient precision to permit us to understand the basis for such action and to seek a ruling with respect to it if we were to conclude that the documents are being improperly withheld.

We assume that the search fees attendant to this request will not be substantial and are prepared to pay any reasonable fees that are incurred. Please let us know if you anticipate that they will exceed \$100.

Very truly yours,

/s/ Grant S. Lewis  
GRANT S. LEWIS

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

November 16, 1979

Grant S. Lewis, Esquire  
LeBoeuf, Lamb, Leiby & MacRae  
140 Broadway  
New York, New York 10005

Re: Freedom of Information Act Request

Dear Mr. Lewis:

This letter is in response to your Freedom of Information Request, Control No. 9-192 dated October 12, 1979 and received in the FOIA Control Office. Your request specifically asks for the following material:

1. Communications (whether or not occurring at a formal meeting) or possible communications involving FCC commissioners and/or staff personnel and representatives of foreign administrations and/or entities attending the recent US/CEPT/TELEGLOBE meeting in Dublin with respect to dealings or possible dealings between foreign correspondents and U.S. carriers not now providing international services through direct connections with foreign correspondents;
2. Communications or possible communications involving FCC commissioners and/or staff personnel and any person (whether American or foreign) with respect to dealings or possible dealings between foreign correspondents and U.S. carriers not now providing international services through direct connections with foreign correspondents;
3. The willingness of foreign correspondents to deal with or consider dealing with U.S. carriers not now providing international services through direct connections with foreign correspondents.

By letter dated October 30, 1979 you confirmed that you were not seeking documents prepared prior to January 1, 1976 and you agreed to extend the FCC's time to respond to your request to November 13, 1979. In a subsequent telephone conversation with Joseph Marino of the Common

Carrier Bureau you agreed to a further extension to November 16, 1979.

We have conducted a thorough search of the Commission's files in response to your request including responsive materials focusing on the Dublin conference, *TAT-7*, Docket 18825 (French telephone excluded), *International Gateways*, Docket 18660, N. Atlantic Planning 1985-95, Docket 79-194, and Graphnet—Telnet matters located within the Common Carrier Bureau, General Counsel's Office and offices of Chairman Ferris and Commissioners Lee, Washburn and Fogarty. The materials which we have located are identified below and discussed in terms of their status under the Freedom of Information Act, 5 U.S.C. § 552 (1976).

#### **I. MATERIAL AVAILABLE FOR INSPECTION**

Some of the material relevant to your request is available for your inspection and is listed in Attachment I to this letter.

#### **II. MATERIAL NOT AVAILABLE FOR INSPECTION**

We have located a number of internal documents prepared by staff members of the Commission for internal purposes which are listed in Attachments II to this letter. Section 552(b)(5) of the Freedom of Information Act exempts from the general requirement of disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency...." 5 U.S.C. § 552(b)(5) (1976). This provision incorporates into the Freedom of Information Act limitations concerning discovery of internal agency material. In addition, Section 0.457 of our own Rules prohibits disclosure of internal agency work papers. That section provides:

- (e) Interagency and intra-agency memorandums or letters, 5 U.S.C. 552(b)(5). Interagency and intra-agency memorandums or letters and the work papers of members of the Commission or its staff will not be made available for public inspection, except in accordance

with the procedures set forth in § 0.461. Only if it is shown in a request under § 0.461 that such a communication would be routinely available to a private party through the discovery process in litigation with the Commission will the communication be made available for public inspection. Normally such papers are privileged and not available to private parties through the discovery process, since their disclosure would tend to restrain the commitment of ideas to writing, would tend to inhibit communication among Government personnel, and would, in some cases, involve premature disclosure of their contents.

Generally, all the documents listed in Attachment II fall within exemption 552(b)(5) and § 0.457(e) because they are all interagency and intra-agency memorandums, letters, work papers of members of the Commission or its staff. Exemption (5)(b) generally operates to protect "internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making process, but not purely factual or investigatory reports." *Soucie v. David*, 145 U.S. App. D.C. 144, 448 F.2d 1067, 1077 (1971). Indeed, Congress intended to limit exemption (b)(5) to protect material of a deliberative or policy-making nature. *Senate Report on the FOIA Act* at 9.

The documents listed on Attachment II would not be available by law to a party in litigation. The rule in certain general discovery cases is that a privilege "obtains with respect to intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and process are formulated". *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd*, 384 F.2d 979, *cert. denied*, 389 U.S. 952 (1967). *See also Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 946, 141 Ct. Cl. 38 (1958).

Specifically, the documents listed in #1. a through e of Attachment II are internal documents created for internal use which would not be available in civil litigation and thus fall within the § 552(b)(5) exemption. The handwritten notes and typewritten compilation thereof listed in 1a

through e of Attachment II are privileged because they contain opinions, advice and deliberative materials reflecting the policy making process.<sup>1</sup> These documents all relate to a meeting held at the Dublin Conference. By design, the meeting was attended solely by agency representatives of the United States and various foreign governments. Further, it was understood by all government representatives that all statements made during the meeting would be held in confidence. The documents were generated to aid the Commission in construction of future international policy and contain FCC staff recollection of statements or representations of policy of foreign sovereigns. It is imperative that the Commission be able to engage in the free flow of information between other agencies of the U.S. Government and foreign governments in order to set intelligent and workable international telecommunications policies. The Court of Claims recognized the need of the government to retain certain internal documents from disclosure to the public in *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 945-46 (Ct. Cl. 1958), where it held that internal opinionative material was privileged because of the need to protect intra-governmental communications and the administrative decision-making process.

If these documents were disclosed, a critical avenue by which the United States gains insight into the status of foreign governments' telecommunications policies and by which information on mutual vital interests is exchanged would be destroyed; the entire purpose of having such meetings to allow for a meaningful dialogue on matters of international scope—on a confidential basis—would be

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<sup>1</sup> Ordinarily, handwritten notes made for the sole use and convenience of the author do not constitute agency records and are not subject to the requirements of disclosure contained in the Freedom of Information Act. See, *Porter County Chapter of Izaak Walton League v. United States Atomic Energy Commission*, 380 F. Supp. 630 (N.D. Ind. 1974). However, the notes in 1. a through e were generated for internal agency use.

comprised.<sup>2</sup> The final result of blotting the free exchange of information would be inimical to the public interest.

Documents #2a through #2f and #3 on Attachment II are draft versions of the final copies of the Telexes listed on Attachment I. The drafts come within exemption (b)(5) because they reflect the mental processes of the staff members of the agency in advising the Chairman as to the final written formulation of telecommunications policy.

Document #4 on Attachment II is an internal memo from a staff lawyer to the then Chief of the Common Carrier Bureau. It is an internal memo containing legal advice and opinions on the applicability of the resale decision to the international communications market. Hence, it is protected from disclosure and falls within the (b)(5) exemption.

Document #5 on Attachment II is an internal paper written by two members of the Common Carrier Bureau staff containing their opinions, advice and deliberative considerations on the subject of the expansion of areas of consultative contact. It is intended only as background information for other members of the Commission who would attend the Dublin Conference. It consists of judgmental evaluations by the staff which "cited, discarded, compared, evaluated and analyzed," *Montrose Chemical Corporation of California v. Train*, 491 F.2d 63, at 68 (1974), to assist the attendees of the meeting in formulating policy statements and determinations. The document contains the mental processes of the agency's staff, a process which the requesting party is not entitled to probe. *Id.* Hence, it too falls within exemption (b)(5) of the FOIA Act and will be withheld.

Documents #6 and #7 are two background memorandum papers written by a staff attorney containing his legal opin-

<sup>2</sup> This is, of course, not to say that public input to the process is unimportant. Most of the consultative process is conducted on a public basis, and certainly any FCC rules and regulation promulgated pursuant to the process are made subject to the public procedures required under the Administrative Procedure Act. Thus, the opportunities for notice to and comment by the public are numerous. These opportunities reaffirm our belief that certain stages of U.S. interface with foreign governments requiring sensitive discussion of nascent policy positions should be permitted the flexibility of non-public, confidential treatment.

ions of Section 214 of the Communications Act and his advise and legal conclusions. These documents contain deliberative and conclusionary material and are not discoverable by law to a party in litigation. They therefore are exempt from inspection and will not be disclosed under (b)(5).

Document #8 is a draft of a proposed speech for Chairman Ferris to deliver at the Dublin Conference written by a member of his staff. The remarks were never made; the words never spoken. The document reflects the deliberative internal agency mental processes and as such is exempt from disclosure under (b)(5).

Document #9 is a memorandum prepared for Commissioner Washburn by one of his aides containing advice and recommendations on an agenda item before the Commission in the fall of 1976. It clearly contains material of a deliberative and policy-making nature. It is not subject to disclosure and falls within the (b)(5) exemption.

Documents #10 through #14 were prepared for Commissioner Fogarty by his legal assistants and contain legal advice concerning the matters indicated in Attachment II. As such the documents are privileged and fall within the (b)(5) exemption.

Document #15 is a memorandum prepared by Commissioner Fogarty for Chairman Ferris regarding the DOD Briefing on National Defense Requirements for Additional International Cable Facilities. It contains opinions on a policy matter pending before the Commission and therefore falls within exemption (b)(5) as discussed above.

### **III. ARRANGEMENT FOR INSPECTION AND RIGHT OF APPEAL**

You may arrange to examine the material listed on Attachment I as available for inspection by contacting Mary Fitzwater of the Compliance and Litigation Task Force in Room 6206, 2025 M Street, N.W., Washington, D.C. telephone number 632-4890. Copies may be obtained through the Downtown Copy Center, 1114 — 21st Street, N.W. Washington, D.C., telephone number 452-1422.

Pursuant to Section 0.461(i) of the Commission Rules, a copy of which is enclosed, you may seek review of the Bureau's action. Any such application for review shall be filed

within 30 days after the date of our ruling and delivered or mailed to the General Counsel.

Philip L. Verveer, Chief, Common Carrier Bureau and Robert R. Bruce, General Counsel, are the officials responsible for the decision to withhold certain of the materials listed above.

Sincerely,

/s/ Philip L. Verveer

PHILIP L. VERVEER

Chief, Common Carrier Bureau

## ATTACHMENT I

## Material Available for Inspection

1. Copy of Telex from Chairman Charles Ferris to Mr. Jean-Claude DeLorme, President of Teleglobe Canada, as transmitted on October 31, 1979, regarding policy positions taken at Dublin, Ireland meeting.
2. Copy of Telex from Chairman Charles Ferris to Mr. Torsten Larsson, Chairman of CEPT/CLTA, Central Administration of Swedish Telecommunications, as transmitted on October 31, 1979, regarding policy positions taken at Dublin, Ireland meeting.
3. Five pages, pp. 106-111, of Transcript of CEPT/U.S.A./Teleglobe Canada, concerning consultative process on North Atlantic Telecommunications, Montreal, Canada, March 22-23, 1979.
4. Telexes, 8/5/77, 6/3/77.
5. A letter dated March 1, 1979, to Mr. Robert Bruce, FCC, from Mr. Robert Seguin of Teleglobe Canada, with attachments.
6. Letter dated September 21, 1979, to Commissioner Fogarty from Bertram B. Tower, ITT World Communications.
7. Telex dated March 13, 1979 from Robert Seguin of Teleglobe Canada to Robert R. Bruce, Esq., General Counsel, FCC and Mr. Enrico Birzzi, of Italcable, Rome, Italy, concerning a conference report to be given at the Montreal, Canada, March, 1979 consultative meeting.
8. Teled dated March 20, 1979 from Robert R. Bruce, Esq., General Counsel, FCC to Mr. Enrico Brizzi, Chairman, CEPT/STA, Italcable, Rome, Italy, concerning the future of the consultative process.

**ATTACHMENT II****Material Not Available for Inspection**

1. Documents generated due to an off-the-record meeting on October 3, 1979 among representatives of CEPT, Canada, NTIA, DOS and FCC in Dublin, Ireland, including:

- a. Handwritten notes of R.E. Gosse, Esq.
- b. Handwritten notes of James Warwick.
- c. Typewritten draft of compilation of Gosse and Warwick notes prepared by R.E. Gosse, Esq.
- d. Copy of typewritten draft of compilation of notes as described in "c" above with James Warwick's suggested changes.
- e. Copy of typewritten draft of compilation of notes as described in "c" above with Thomas J. Casey's, Esq. suggested changes.
- f. Handwritten notes from Thomas J. Casey, Esq. to Robert E. Gosse, Esq. regarding typewritten compilation.

2. Drafts of the October 31, Telexes in #2 of Attachment I from Chairman Ferris to Mr. Torsten Larsson, Chairman of CEPT/ELTA, Central Administration of Swedish Telecommunications on the following dates:

- a. 10/24/79
- b. 10/26/79
- c. 10/29/79
- d. 10/30/79
- e. 10/30/79
- f. 10/31/79

3. Draft of October 31 Telex in #1 of Attachment I from Chairman Ferris to Mr. DeLorme on 10/30/79.

4. Memorandum dated August 25, 1976 from Joel S. Winnik, Esq. to Walter R. Hinchman, Chief, Common Carrier Bureau, on subject of Applicability of Resale Decision to International Communications market.

5. Memorandum entitled "Expansion of Areas of Consultative Contact" prepared by R.F. Gosse, Esq. and James Warwick in September, 1979, for background for FCC attendees of Dublin, Ireland Conference.

6. Background memo undated from Russell Frisby, Esq. to James Smith Esq. prepared in September, 1979, for FCC attendees of Dublin, Ireland, regarding Section 214 Applications for provision of International Service.

7. Background memo undated prepared in September, 1979, from Russell Frisby, Esq. to James Smith, Esq. for FCC attendees of Dublin, Ireland on CCI and International Television.

8. Unused draft prepared by his staff for Chairman Ferris' opening remarks for Dublin, Ireland conference.

9. Memorandum dated October 15, 1976 prepared by Sebastian A. Lasher for Commission Abbott Washburn regarding the revision of authorization of Graphnet Systems, Inc. to comply with decision of U.S. Court of Appeals, 2nd Circuit in No. 77-4028.

10. Memorandum, dated December 16, 1976, to Commissioner Fogarty from Angela Shaw, the Commissioner's Attorney-Advisor, on the subject of the December 20, 1976 Reston meeting;

11. Undated memorandum to Commission Fogarty from Lawrence Katz, Attorney-Advisor to the Commissioner, summarizing Common Carrier No. 1, Special Meeting of October 25, 1978, re: TAT-7, Docket No. 18875 reconsideration;

12. Undated memorandum to Commissioner Fogarty from Lawrence Katz, the Commissioner's Attorney-Advisor, on Item No. 1 for the Special Meeting of February 22, 1979, re: Docket 18875, Phase III;

13. Undated memorandum to Commissioner Fogarty from Lawrence Katz, Attorney-Advisor to the Commissioner, re: Trans-atlantic Communications Facilities/Planning;

14. Undated memorandum to Commissioner Fogarty from Lawrence Katz, Attorney-Advisor to the Commissioner, re: Trans-atlantic Communications Facilities/Comments on AT&T's August 31 filing;

15. Memorandum from Commissioner Fogarty to Chairman Ferris, dated October 5, 1978, re: DOD Briefing on National Defense Requirements for Additional International Cable Facilities;

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

File No. RM-3523

In the Matter of

**ITT WORLD COMMUNICATIONS INC.**

Petition for Rulemaking Concerning  
Contacts Between the F.C.C. and  
Foreign Telecommunications  
Administrations With Respect to  
Future International Communication  
Services and Entry of New Common  
Carriers

**PETITION FOR RULEMAKING**

ITT World Communications Inc. (ITT Worldcom) pursuant to Section 4(e) of the Administrative Procedure Act, 5 U.S.C. Section 553(e), and Section 1.401(a) of the Commission's Rules, hereby petitions the Commission to adopt rules of practice and procedure, consistent with its statutory authority, to regulate its contacts with foreign administrations and telecommunications entities to ensure that neither the rights of existing U.S. international service carriers are prejudiced, nor the integrity of the Commission's processes is in any way compromised. In support of its petition, ITT Worldcom submits as follows:

**PRELIMINARY STATEMENT**

ITT Worldcom has been advised that the Commission, through its Telephone and Telegraph Committee and Staff, contemplates private contacts with foreign administrations and telecommunications entities, particularly the members of CEPT, in order to discuss such subjects as the provision of future international telecommunications services, and the proposed entry of new U.S. common carriers into international services by way of direct operating relationships with foreign carriers.

ITT Worldcom questions the wisdom of such proposed activities, and contends that the Commission lacks authority to participate in them. If, however, the Commission so intends, ITT Worldcom respectfully proposes that it must, at the outset, adopt rules of practice and procedure to govern all contacts with foreign entities. Such rules should define with care, both what the Commission may undertake to do, and the manner in which it may proceed. In this pleading, ITT Worldcom will first address the underlying policy considerations (Part I, "the what"), including *inter alia*, the Commission's purpose for meeting with foreign administrations, the authority and obligations of the participating Commission representatives and the areas appropriate for discussion; thereafter, it will propose a procedure (Part II, "the how") to govern the manner in which such discussions may be conducted so as to afford due process protection to all existing international service carriers who operate under the jurisdiction of the Commission, and all other parties interested in the effects, both direct and indirect, of such Commission dialogues with foreign administrations. Finally, ITT Worldcom will set out its statement of Proposed Rules for Commission consideration (Part III, pp. 22-25).

The proposed rulemaking should, at the minimum, request comments and responses as to all the issues raised herein regarding both policy and procedures for such contacts. The Commission might also proceed by Notice of Inquiry should it determine that to be the more orderly manner.

#### **I. THE COMMISSION CANNOT PARTICIPATE IN A DIALOGUE WITH FOREIGN ADMINIS- TRATIONS ABSENT CLEAR CUT LEGAL AND JURISDICTIONAL AUTHORITY**

It is imperative at the threshold that the Commission issue a policy statement delineating the proper scope of proposed meetings with foreign administrations and telecommunications entities and the authority of Commissioners and staff to participate in such meetings.

### A. Neither The Commission Nor Its Members May "Negotiate" With Foreign Governments Or Entities

It is self-evident that the Commission lacks the legal authority to "negotiate" with foreign governments, on behalf of the United States, such power being reserved to the President and the State Department. Such limitations have been acknowledged countless times in recent history.<sup>1</sup>

Among nations which participate in the provision of international telecommunications services, the United States is unique in that its service is not provided by the government or a quasi-governmental entity, but by regulated private industry, operating in a competitive marketplace. The Commission, because it must ultimately review all applications of the U.S. international service carriers for the construction of new international facilities, has been urged by the CEPT administrations to consult on such issues as planned cable facilities so that the international service carriers do not negotiate with them in a void. And, to date, the Commission has exercised care in consulting rather than negotiating with foreign administrations, limiting its involvement to the exchange of factual information of mutual concern.

However, recent statements by various Commissioners and Commission Staff seem to be leading the Commission into dangerous new ground by appearing to tie TAT-7 authorizations, for instance, to notions of reciprocity, a term

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<sup>1</sup> In a letter to CLTA Chairman Larsson, regarding the "consultative process," Chairman Ferris stated: "*the Commission cannot engage in discussions which might be construed as negotiation of differences between the present U.S. and CLTA/Teleglobe facilities plan. Facilities plans of all concerned entities must be developed independently in accordance with our respective national interests, goals and statutory obligations.*" (Emphasis supplied).

The then Chief of the Common Carrier Bureau, following the first subconsultative assembly in Munich (Germany, October 28 through 30, 1974) similarly stated on November 26, 1974, at an open Commission meeting. See also *Overseas Communications*, 67 F.C.C.2d 353 (1977).

which is not synonymous with "comity" or even necessarily consistent with it.<sup>2</sup>

Because any proposed dialogue with Europeans (or other overseas administrations) on the subject of new U.S. international services and entities, must be held against the backdrop of Section 1 of the Communications Act, 47 U.S.C. Section 151, and the Commission's mandate to foster a rapid and efficient worldwide telecommunications system, the Commission has an affirmative responsibility to cooperate with foreign telecommunications entities toward achievement of that goal. In the absence of clear-cut policy provisions, foreign administrations could misinterpret statements made by the Commissioners as efforts to negotiate with them, or to represent the United States in foreign policy matters with them, even though such objectives would be outside the scope of Commission authority.

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<sup>2</sup> Commissioner Fogarty, for instance, issued a separate statement on February 26, 1979, 71 F.C.C.2d 64, 97, which included the following remarks (at 99):

"Coupled with the need for circuit planning is the necessity for the foreign correspondents to recognize our competitive policies. Many other foreign correspondents have balked at dealing with more than a small number of United States carriers. The specialized carriers which we have authorized to offer international services have met with almost universal opposition when seeking operating arrangements abroad. Now that the Commission has considered and, to some degree, deferred to the policies and expressed needs of the foreign governments, we should expect "tit for TAT" from the Europeans in terms of *their* recognition of *our* competitive policies and *their* agreement to deal with *our* multiplicity of carriers. Without such reciprocity, I cannot see how we can give any weight or consideration to the Europeans' internal needs and policies in our future dealings. In the final analysis, reciprocity must be a two-way street, a dialogue rather than a monologue." (Emphasis in original).

Additionally, a Docket 18875 "Sunshine Meeting" dialogue between Commissioner Lee and the then Chief of the Common Carrier Bureau, on November 23, 1977, included an exchange regarding the CEPT nations, in which Commissioner Lee indicated that he was sensitive to comity, which must be a two way street. He asked if there were any recent instances when it went the other way. The Bureau Chief replied that the CEPT members had recently indicated they had no desire to work with the value added carriers, Graphnet and Telenet.

Concerns of foreign administrations that the Commission intends to exercise jurisdiction over them have been expressed in the context of North Atlantic Planning. In a telex message dated November 2, 1978, CEPT/CLTA Chairman Larsson stated:

"We have made it plain on several occasions that as representatives of sovereign countries the CEPT administrations cannot be subject to the jurisdiction of U.S. authority."

Even if the Commission intends that subsequent meetings with foreign representatives will involve only the exchange of information regarding new entries, it should indicate in advance, its understanding of the word "comity" in that limited context. In *Overseas Communications*, 67 F.C.C.2d 358, 418 (1977), the Commission, when discussing what "comity" required of it when presented with the views of the European governments, stated that all "comity" means is "having one's views considered as well as considering the views of others" and that "each party to the international communications joint venture provide . . . in support of its views concerning possible facility programs, the most comprehensive information available . . ." It thus suggested that, so long as it considered the views of the Europeans, it was free to reject them, and go on to do whatever it pleased.

This view is a mistaken one, as it implies that overseas administrations are little more than supplicants under the Commission's jurisdiction, whose views are entitled to no more consideration than those of private parties. But no definition of international comity can disregard the sovereign status of the overseas administrations. Indeed, comity does not exist absent sovereignty. See *Hilton v. Guvot*, 159 U.S. 113, 163-64 (1895).

The meetings proposed by the Commission are similar, in many respects, to the "summit meetings" between individual Commissioners and the broadcast industry which were at issue in *Writers Guild of America, Inc. v. F.C.C.*, 423 F. Supp. 1064, 1157 (C.D. Cal. 1976); although such meetings involved entities *within* the jurisdiction of the agency, language in that decision suggests the need for an unequiv-

ocal policy statement, indicating that the Commission has no intention of coercing the foreign administrations:

Without choosing actively to regulate future FCC conduct in this area, the court notes that such summit meetings are extraordinary, unnecessary to achieve an objective of merely making suggestions, sure to generate undue pressure and to create an appearance of impropriety, and strongly indicative of an FCC intent to compromise broadcaster decisionmaking. Moreover *FCC suggestions unaccompanied by clear and unequivocal denials of an intent to regulate take on the appearance of threats.* The Commission and its representatives must avoid the appearance of impropriety if respect for its processes is to be maintained. (Emphasis supplied).

See also, *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970). The policy statement which ITT Worldcom suggests will merely restate the limitations which are applicable, as a matter of law, to the Commission representatives who attend any meeting with foreign administrations.

**B. The Commission Must Articulate Rules To Ensure That It Does Not Advance Positions Or Articulate Viewpoints Which Effectively Prejudge Pending Or Future Decisions**

The Commission should address in its rulemaking, the propriety of solicitation of information *from*, and presentation of its position *to*, foreign administrations particularly as regards related matters pending before the Commission, or related proceedings which are expected to arise in the future.

The due process problems which arise upon receipt of off-the-record information will be discussed below (Point II C, pages 18-22). As a matter of policy, however, the proposed rules should prohibit the Commission or any of its members or Staff from advancing positions or articulating viewpoints which will necessarily compel it to prejudge proceedings upon which it will later be expected to make a judgment.<sup>3</sup>

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<sup>3</sup> Commission regulations proscribe employee conduct which might result in or create the appearance of providing preferential treatment to any person; losing complete independence or impartiality, or making

If, for instance, the Commission were to make known to foreign administrations its desire that the international administrations enter interconnection agreements with U.S. carriers not yet providing international service through direct connections with foreign carriers, thereby placing itself in an advocacy posture, it would, by definition, be committing itself to affirmative decisions granting applications by those carriers currently pending before it. Such open dockets include *Graphnet Systems, Inc.*, 67 F.C.C.2d 1020, issued upon reconsideration, released April 3, 1979. (FCC 78-181); and its motion for "expedited reconsideration," File Nos. I-P-C-11 and I-P-C-11+A, FCC 79-249, released May 4, 1979; Graphnet's Application for Supplemental Authority to Provide Certain Digital Communications Services to Terminals located in [11 European countries], File No. I-P-C-59; AT&T's application to provide international Dataphone service, Docket No. 19558; GTE Telenet's application to provide international service (*ITT Worldcom v. F.C.C.*, No. 77-4028 remanded by 2d Cir., as Commission File No. I-T-C-2634); FTC Communications's application to provide international record services via San Francisco, Ca. and Washington, D.C., (file No. I-T-C-2650), remanded to the Commission by the Second Cir. Court of Appeals on July 17, 1979 and re-opened under No. FCC 79-452. In addition, there are pending informal complaints filed by ITT Worldcom and Western Union International, Inc. against Consortium Communications International, Inc. (CCI), (File Nos. TS 9-78 and TS 78-1945) and letters have been transmitted to the Commission asking it to take appropriate actions against Western Union Telegraph Company, for its illegal entry into international telecommunications. The Commission also has before it the ARINC Petition for Partial Reconsideration of the TAT-7 Authorization (Docket No. 18875), and the second Computer Inquiry (Docket No. 20828).

Each of these matters deals with the provision of international telecommunications services within the current pur-

view of the Commission. If the Commission in any way attempts to convince the international administrations to enter interconnection agreements involving Graphnet, GTE Telenet or CCI, it will have effectively prejudged those pending matters. It might also commit itself informally to a position on other proceedings as well.<sup>4</sup> In this way, it will preordain results in these matters, by virtue of what it says as well as what it hears.

A report by the Comptroller General of the United States, "Greater Coordination and More Effective Policy Needed for International Telecommunications Facilities," March 31, 1978, dealt with a similar issue as regards the Commission's "instructional process" to Comsat at Intelsat proceedings in advance of Commission rulings on Comsat's Section 214 applications. The report stated (at 43):

Department of State and OTP officials, as well as a former responsible FCC official, felt that FCC had lost its options for ruling on Comsat's pending Section 214 application to participate in the Intelsat V program. In particular, an OTP official felt that instructions given through the instructional process bind FCC to a particular course of action in later deciding on Comsat's Section 214 application. As an example, this official stated that *if FCC gave Comsat an instruction to vote for a particular facility acquisition, FCC could not in a later Section 214 hearing decide that Comsat could not utilize the facility or include the facility in its rate base.*

Comsat officials shared OTP's viewpoint. They told us they believe that an instruction containing approval or offering no objection to Comsat voting for a particular facility commits FCC to approve Comsat's Section 214 application." (Emphasis supplied).

Committee or Commission statements might even predetermine the outcomes of proceedings not yet begun, such as

<sup>4</sup> Furthermore, the Commission's failure to encourage interconnections with IRCs to European telephone circuitry, for dataphone-type services, might indicate to the foreign administrations an unwillingness on the part of the Commission to approve such arrangements, and might predetermine the outcome of such proceedings before it.

follow-on facilities to Intelsat V or further cable applications.<sup>5</sup>

The prejudgment issue has arisen before. In *Cinderella Career and Finishing School, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970) the D.C. Circuit Court of Appeals remanded a proceeding to the Federal Trade Commission and disqualified its Chairman, Paul Rand Dixon from further involvement, on the basis of a speech which he had made while the matter was pending, which indicated prejudgment of that matter.

"Conduct such as this may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." (425 F.2d at p. 590).

See also, *Gilligan, Will & Co. v. FTC*, 267 F.2d 461, 469 (2d Cir. 1959), *cert denied*, 361 U.S. 896; and *Texaco Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1969), vacated and remanded on other grounds, 381 U.S. 739.

The same legal issue is presented here. The Commission cannot retreat from a partisan position once taken, so as to maintain even the appearance of neutrality in considering related applications before it.

### **C. The Commission Should Preliminarily Determine Which Services And Carriers Will Be The Subject Of Its Discussions With The Europeans**

Should a legal means be rationalized for engaging in such information gathering, the Commission should examine, with care, the issue of which services and carriers should be the subject for discussion, as the very selection of questions posed to foreign administrations and telecommunications entities may convince them that the Commission is

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<sup>5</sup> ITT Worldcom recognizes that the Telephone and Telegraph Committee members might recuse themselves from participation in the proceedings cited herein and any other matters relevant to the proposed discussions. Such action, however, would not only deprive the Commission of three of its members on vital issues; it would also render the Committee's contacts with the foreign administration useless.

sponsoring certain services and carriers to the detriment of others.<sup>6</sup>

For instance, should international Dataphone type service be explored, as well as packet switching systems? Is the Commission not obliged, in selecting carriers for discussion with foreign administrations, to scrutinize each carrier's current status, including, for instance, the fact that both GTE Telenet and Graphnet have access to United States customers without the gateway limitations which inhibit the international service carriers? Should not the Commission examine the degree to which a particular carrier dominates or monopolizes a particular service, for instance, AT&T's Dataphone or GTE Telenet's dominant position in domestic packet switching?

In discharging its duty to represent the public interest, the Commission, as an administrative agency, has an existing obligation to measure the impact of its decisions against the "fundamental national economic policy" expressed in the antitrust laws.<sup>7</sup> As one court has observed:

"[A]ntitrust policy is of such national importance that regulatory agencies should apply that policy *sua sponte* in order to discharge their duty to represent the public interest."<sup>8</sup>

Commission involvement in the selection process contemplated raises serious antitrust questions, which must be resolved at the outset. If the Commission intends, by its meetings with foreign entities, to foster competition, preliminary proceedings must determine first, that the services and carriers selected do not, by their very nature, subvert the legitimate forces of marketplace competition.

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<sup>6</sup> ITT Worldcom submits that such crucial judgments cannot be made without on-the-record input from U.S. entities as well as others willing to provide information. See Point II C below.

<sup>7</sup> *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966).

<sup>8</sup> *Martin-Trigona v. F.R.B.*, 509 F.2d 363, 367 (D.C. Cir. 1975). The Commission itself has recognized that the prevention of anticompetitive conduct by a monopoly carrier is "imperative and in the public interest." *AT&T*, 50 F.C.C.2d 501, 511 (1974).

## **II. THE COMMISSION CANNOT PARTICIPATE IN A DIALOGUE WITH FOREIGN ADMINIS- TRATIONS ABSENT RULES SAFEGUARDING THE DUE PROCESS RIGHTS OF ALL INTER- ESTED PARTIES**

Should the Commission determine, on the basis of the foregoing policy evaluation, that it may proceed with an exchange of information with foreign administrations and communications entities, it must lay the formal groundwork for such activity by way of a rulemaking which will ensure that the due process rights of the existing international service carriers and other interested parties are, in no way, abridged.

### **A. Such Rules Should Ensure That Proper Notice Of All Meetings Be Given In A Timely Manner**

The Commission should undertake to provide public notice of all intended meetings with foreign authorities and the subjects earmarked for exploration.

In addition to considerations of fundamental fairness, there are important practical reasons for providing the interested carriers notice of any proposed meeting with foreign carriers, and an opportunity to comment on the subjects which the Commission proposes to discuss. First, the interested carriers will identify subjects which should not be discussed because they relate to pending or contemplated proceedings; the carriers may also be able to suggest additional subjects for discussion which are necessary to give the Commission a fuller understanding of a problem area.

Moreover, the international service carriers, which must obviously work closely with the foreign administrations, can assist the Commission in determining, at the threshold, whether a given subject is likely to be a fruitful area for discussion and how the foreign administrations may react to the subjects which the Commission proposes to discuss. Furthermore, the Commission will obviously be more fully prepared to engage in discussions with foreign administrations if the American carriers are provided the opportunity to give the Commission the benefit of their financial and op-

erational views and experiences regarding the subjects to be discussed.

### **B. Such Meetings Should Be Held In Public**

A rule ensuring that all meetings with foreign administrations and telecommunications entities should be open to all interested parties comports with the doctrine that public business should be conducted in public, as expressed in the Government in the Sunshine Act, 5 U.S.C. Section 552b.

Until the Commission has expressed its policy intent with regard to the planned meetings (pursuant to Point I, *supra*), it is difficult to ascertain whether the Sunshine Act is directly applicable to such meetings. It would, of course, apply, if the proposed meetings advance beyond the mere exchange of information.<sup>9</sup> In any event, the *policy* expressed in the Sunshine Act that: "the public is entitled to the fullest practicable information regarding the decision-making process of the Federal Government," should be applicable to even a meeting with foreign administrations for the exchange of data and ideas.

In view of this policy, and the obvious interest which the international carriers have in participating in the meetings with foreign administrations, the Commission should provide by rule that the meetings be open to the public except in those exceptional instances in which the full Commission expressly decides, under the guidelines of the Sunshine Act, that a particular meeting must, for good cause, be held in private.

In the event of its exclusion, any interested party should be notified in advance, in writing, of the Commission's rationale for such exclusion, as a party is entitled to know the grounds for an administrative determination which is adverse to his interest. 5 U.S.C. Sections 553, 557. A similar provision of the Sunshine Act, 5 U.S.C. Section 552b(f)(1), requires the agency to certify publicly its reasons for holding a closed meeting. See, also, 47 C.F.R. Section 0.605(c)(2), (d)(2).

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<sup>9</sup> Should that occur, the provisions of 47 C.F.R. Section 0.601 through 0.607, which require open meetings except in narrowly limited circumstances, would also apply.

Notification in advance of its exclusion is necessary to permit the excluded party to advise the Commission of any reason why such exclusion is erroneous, and to take any other steps which may be necessary to protect its rights. For example, ITT Worldcom believes that it and the other international carriers were excluded from the recent meeting in Dublin between Commission members and foreign administrations because the Commissioners felt that the antitrust laws so required. On the contrary, the antitrust laws may be violated when interested parties are denied an opportunity to participate. If ITT Worldcom had been advised of such concerns in advance of the scheduled meeting, it would have had an opportunity to convince the Commission, or a judicial tribunal, that such concern about the anti-trust laws was misplaced.

### **C. All Meetings With International Entities Must Be Held On The Record**

As discussed, *supra*, at p. 8, the Commission or Committee members must exercise caution to avoid prejudgment, or even the appearance of prejudgment, of issues involved in pending proceedings. It is also imperative, as a matter of basic due process protection, that Commission members attending off-the-record discussions minimize the possibility of receiving information upon which they could rely, when deciding pending (or prospective) proceedings.<sup>10</sup> See the

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<sup>10</sup> As stated in fn. 3, *supra*, the Committee members could disqualify themselves from participation in such proceedings. They would also have to refrain, however, from briefing the other Commissioners on what they have heard, so as not to taint the record, thereby rendering the information gleaned from foreign entities of no practical value. Furthermore, even exercising the utmost caution, Committee members might well run afoul of due process requirements. As stated in *Berkshire Employees Assn. of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3rd Cir. 1941):

"Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."

See also, *Cinderella Career*, *supra*, at 592 and *American Cyanamid Co. v. FTC*, 363 F.2d 757 (D.C. Cir. 1966).

Commission's *ex parte* rules, 47 C.F.R. Section 1.1201 through 1.1251.

The Commission (or any of its members) are interdicted from discussing, at *ex parte* meetings with others, any factual issues relevant to ongoing rulemaking or adjudications.<sup>11</sup> In this regard, see *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977); *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970); and *Sangamon Valley Television Corp. v. United States*, 264 F.2d 221 (D.C. Cir. 1959).

It is well established that if the Commission uses information obtained from foreign administrations as the basis for any future administrative decision, the Commission will be obliged to place all such information on the record at that time. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *HBO, supra*; *Portland Cement Assn. v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973). Disclosure of the information on which the Commission relies is required because it "not only allows adversarial critique of the agency but is perhaps one of the few ways that the public may be apprised of what the agency thinks it knows in its capacity as a repository of expert opinion." *HBO, supra*, 567 F.2d at 55. Moreover, such disclosure is necessary to permit effective judicial review. *Overton Park, supra*; *HBO, supra*; *Portland Cement, supra*.

Should the Commission rely on information from the foreign administrations in any future decision, two serious problems will arise: (1) ascertaining the basis of the Commission's factual knowledge and (2) assuring that interested parties will have an adequate opportunity to rebut or challenge the information provided by the foreign administrations.

The proposed regulations deal with these procedural problems in several ways. First, the regulations require all

<sup>11</sup> Even in informal rulemaking, the *ex parte* proscriptions apply in cases of "selective treatment of competing business interests of great monetary value." *Policies and Procedures Regarding Ex Parte Communications During Informal Rulemaking Proceedings*, Order, Notice of Inquiry and Interim Policy Statement, FCC 78-405, Released June 14, 1978, Gen. Docket No. 78-167, Para. 6 (quoting Judge MacKinnon's concurring opinion in *HBO, supra*).

meetings with the foreign administrations to be conducted on the record, with a full transcript or recording available to the public. Thus, if the Commission should decide to use information obtained from foreign administrations in any future proceeding, interested parties will have full access to *all* of the factual information which was provided to the agency, and will be able to undertake their own analysis or explanation of that information when they present their own cases to the Commission.

Preserving a record of the information provided by foreign administrations will not, however, eliminate the possibility that interested parties will be unfairly prejudiced if that information is used in a future proceeding. The foreign administrations are not subject to the Commission's jurisdiction, cannot be cross-examined and cannot be compelled to provide interested parties with additional information during the Commission proceedings where their data will be used. Any carrier that is adversely affected by the use which the Commission makes of the foreign administrations' information will therefore have no adequate remedy if the Commission's assessment is made on the basis of information which is incomplete or inadequate. *See, e.g., HBO, supra, and Portland Cement, supra, 393.* *See, generally, Moss v. C.A.B., supra.* The only sure way of preventing prejudice to the interested carriers is to allow them to participate in meetings with the foreign administrations, and to place their own views on record, so that the information obtained by the Commission contains a complete record of the views of all knowledgeable and interested parties.

#### STATEMENT OF PROPOSED RULES

By reason of the foregoing, it is plain that the Commission must, at the threshold, face the issue of whether its contemplated course is a permissible one. If it so finds, it must adopt both new rules of policy which clearly delineate the purpose for meetings with the foreign administrations, and the authority and obligations of the Commission representatives who participate in them, and new rules of procedure which will afford due process to the carriers and other

parties interested in the Commission's meetings with the foreign administrations. Accordingly, ITT Worldcom proposes that the Commission adopt, pursuant to section 4(i) of the Communications Act, 47 U.S.C. Section 154(i), a statement of policy and procedure to read substantially as follows:

"(1) The Commission recognizes that the sole purpose of its meetings with foreign administrations is to exchange information of mutual interest. The Commission expressly disclaims any intention to negotiate with foreign administrations, or to attempt to subject sovereign states (or those exercising the jurisdictional powers of such states) to its regulatory jurisdiction.

(2) The Commission also recognizes that Commission representatives who attend any such meetings have not been delegated authority to make regulatory decisions on behalf of the entire Commission, and that any statements which the representatives may make at the meetings therefore are made on their own behalf and are not binding either upon the Commission or the United States.

(3) To ensure that the information gathering process does not result in a *de facto* obviation of the Commission's statutory obligations, or the deprivation of procedural and substantive due process rights of interested parties, the Commission and its representatives at meetings with the foreign administrations will expressly refrain from (a) discussing the merits of any matter which is the subject of a pending hearing, rulemaking, or other proceeding before the commission, or (b) advocating or advancing the interest of one American carrier or service at the expense of any other.

(4) The Commission shall provide public notice, at least 30 days in advance of any meeting or communication with representatives of foreign administrations or telecommunications entities, of the time and place of the proposed meeting and of the subject matter which the Commission proposes to discuss. In response to this notice, any interested party shall have the opportunity (a) to comment in writing on the propriety or wisdom of the Commission's intention to discuss the subject matter in question with the foreign administra-

tions; (b) to inform the Commission of its interest or position concerning that subject; (c) to propose additional subjects for discussion at the meeting; or (d) to make any other appropriate comment concerning the planned meeting. Prior to attending such meeting, the Commission shall issue another public notice which, in summary form, indicates its disposition of all comments received, including subjects added or deleted.

(5) Any meeting attended by representatives of foreign administrations or telecommunications entities will be public and open to all interested parties, unless the Commission expressly determines otherwise in the case of a particular meeting, by application of the criteria expressed in the Government in the Sunshine Act. In the event that any party is to be excluded from a meeting, the Commission will provide that party with a written statement of the reasons for its exclusion at least five days prior to the scheduled meeting date.

(6) All meetings with foreign administrations shall be held on the record, and the transcript or recording of the meeting shall be available to the public at the Commission offices.

(7) Any interested party will be afforded the opportunity to present its views, orally or in writing, to all meetings between foreign administrations and the Commission."

ITT Worldcom respectfully submits that the above regulations will create a suitable regulatory framework for any proposed meetings with representatives of foreign administrations or telecommunications entities, so as to ensure that such meetings can proceed in a manner consistent with the procedural and substantive rights of all interested parties. Such proposed rules are in no way intended to be comprehensive, but merely suggestive of problems which the Commission must confront if it intends to embark upon a course of contacts with foreign administrations and telecommunications entities.

### CONCLUSION

For the reasons stated above, the Commission should revise its policy and procedures in the manner proposed herein.

Respectfully submitted,

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Dated: OCTOBER 24, 1979.

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

File No. RM-3523

In the Matter of  
ITT WORLD COMMUNICATIONS INC.

Petition for Rulemaking concerning  
Contacts Between the F.C.C. and  
Foreign Telecommunications  
Administrations With Respect to  
Future International Communication  
Services and Entry of New Common  
Carriers

REPLY COMMENTS OF  
ITT WORLD COMMUNICATIONS INC.

ITT World Communications Inc. (ITT Worldcom) hereby submits its Reply Comments in response to comments filed by other parties participating in this proceeding.

In its Petition for Rulemaking herein, ITT Worldcom questioned the wisdom of private contacts between the Commission, through its Telephone and Telegraph Committee and Staff on one hand, and foreign administrations and telecommunications entities, on the other, for the discussion of new international services and carriers. It stated that if the Commission, nevertheless, intended to embark upon such a course, it must, at the outset, ensure that its participation proceed from clear cut legal and jurisdictional authority; it therefore asked the Commission to undertake a rulemaking, addressing first, the propriety of such an undertaking, and, second, a proper procedure to govern its participation so as to afford basic due process protection to all existing international service carriers which operate under Commission jurisdiction, and to all other parties interested in the effects of such Commission contacts.

This clarion call for observance of fundamental constitutional and statutory law has been met with "responsive" comments by four putative international service

carriers—GTE Telenet (GTE), Southern Pacific Communications Company (SPCC), Satellite Business Systems (SBS) and Graphnet, Inc. (Graphnet)—all of which vilify ITT Worldcom for its “presumptuousness” and urge the Commission to dismiss the Petition for Rulemaking and get on with its plans, regardless. Each argues that ITT Worldcom’s suggested rules are prompted by “protectionism” and must be put aside, for that reason alone. Striking a Machiavellian pose, each states that since the Commission’s motives must be pure, its means may not be questioned. Indeed, the alarmist tone of the pleadings, each implying that for the Commission to abide by the Constitution and the law is tantamount to its failure to discharge its affirmative responsibilities, is itself alarming in its implications.

In its Reply, ITT Worldcom will discuss the primary underlying issue, the Commission’s lack of authority for the course upon which it is apparently embarking (Point I), and the particularly acute necessity for resort to traditional Constitutional protections for all parties which might be affected by the Commission’s contemplated actions (Point II).

#### **I. THE COMMENTS FILED HEREIN UNDERSCORE A COMMON UNDERSTANDING THAT THE COMMISSION’S CONTEMPLATED CONTACTS INVOLVE INTERDICTED “NEGOTIATIONS”**

Although the Comments noted above all decry ITT Worldcom’s attempt to thwart what is characterized as a mere exchange of information, and all pay lip-service to the concept that the Commission is forbidden to negotiate with foreign governments, it is clear that all parties discern an underlying attempt by the Commission “to seek the cooperation of foreign administrations in implementing [Commission] policy”;<sup>1</sup> to “influence the effectuation of policies which it has found to be in the public interest”;<sup>2</sup> “to accomplish its pro-consumer objectives;”<sup>3</sup> “to present and discuss

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<sup>1</sup> GTE Telenet Comments, p. 5.

<sup>2</sup> *Id.* at p. 7.

<sup>3</sup> SPCC Opposition to Petition for Rulemaking, p. 2.

its policies with foreign telecommunications administrations,"<sup>4</sup> and to engage in the "spontaneous flow of discussions that could lead to real understanding."<sup>5</sup> The nature of the "real understanding" was set out by Chairman Ferris in a statement dated December 12, 1979, which accompanied the Commission news release announcing the Commission's order regarding a staff audit of the international carriers, where he stated:

"We are now engaged in a set of discussions with representatives of other countries which we hope will lead to greater cooperation in the introduction of new services and lower prices.

In conclusion I believe we have taken a significant step toward increasing competition in the international communications market. I am committed to examining other steps toward this goal. The carriers should be aware that the easy, and profitable, life inside the cartel is over."

What, indeed, are "negotiations," if not "discussions which [we hope] will lead to greater cooperation"? Certainly, the simple exchange of information cannot be expected to change the apparent policy of foreign governments. Were that true, the commission would have only to release to the foreign telecommunications entities any recent FCC decisions which define and explain Commission policy as regards these issues of "mutual concern."

In reality, however, the sitting Commission has never made findings on the necessity for foreign cooperation in assisting the entrance of new carriers or Commission involvement in securing their cooperation. Certainly no such findings exist in the *Graphnet*<sup>6</sup> docket. Contrary to the mandate of Section 553 of the APA (5 U.S.C. Section 553), there has never been an opportunity afforded to affected carriers to comment upon any new public policy in that regard. Absent this vital authority, the Commission cannot

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<sup>4</sup> SBS Comments

<sup>5</sup> *Graphnet* Comments, p. 9.

<sup>6</sup> *Graphnet Systems, Inc.*, 63 F.C.C.2d 402 (1977), recon. denied, 67 F.C.C.2d 1020 (1978), affirmed *sub nom. ITT World Communications Inc. v. F.C.C.*, No. 77-4028 (2nd Cir. March 22, 1979).

engage in the exercise of advocating or securing such "co-operation" from foreign administrations, either on or off the record. To do so would be an abuse of the quasi-judicial functions entrusted to the Commission, and would render affected carriers powerless to seek redress. If, on the other hand, a decision to enter these discussions were made on the basis of a record proceeding, affected carriers, both present and putative, would have both an opportunity to comment and the right to appellate review.

The commenting carriers herein, believe as they might that Commission discussions with CEPT administrations would serve their economic interests, cannot sweep these fundamental issues under the rug with angry recriminations about ITT Worldcom's "desperation and presumptuousness" (*Graphnet*, p. 4) which would "stifle" (*Id.* at 9) "forestall," "preclude" and "hinder realization of a potentially beneficial alternative" (SBS, p. 3) with "cumbersome processes and procedures [which] might be established as conditions precedent to Commission interaction with representatives of foreign governments" (*Id.* at 6); or "severely constrict the ability of the Commission to influence the effectuation of policies which it has found to be in the public interest" (GTE at 7).<sup>7</sup>

Commenting parties have raised the issue of Commission involvement in facilities planning, stating that ITT Worldcom was not heard to complain about the legality of such meetings (see GTE Comments, p. 4).<sup>8</sup> The Docket No. 18875 meetings are easily distinguishable from the instant contacts, first, because they represented part of docketed, on-going proceedings; second, because they were not held in secret, but (which one exception about which ITT

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<sup>7</sup> Several spurious issues have been injected into various comments in the proceeding, which will not be dealt with herein. Not at issue, for instance, are the wisdom of the *Graphnet* decision, the technological competence of ITT Worldcom and other existing international carriers, or the timeliness for a re-examination of international resale and shared use policy. At issue herein, however, are fundamental concepts whose urgency demands that they neither be postponed nor diluted with matters of the sort cited above.

<sup>8</sup> See also, SPCC Comments, p. 3.

Worldcom did complain) at public sessions attended by interested and involved parties; and finally, because such meetings did not affect the equitable role of the Commission in dealing with its regulatees. It did not single out any one entity over others for foreign consideration, but dealt with all public-service carriers equally.

ITT Worldcom has taken no position upon the legality of direct Commission involvement in North Atlantic Planning or other Docket No. 18875 matters. It may be that the instant matters may raise a full panopoly of issues with regard to the entire planning process. If a later reviewing court should find that even Commission action in those matters was *ultra vires*, the Commission in taking the bold steps at issue here, will have brought such outcome upon itself, and ITT Worldcom has no hesitancy in facing up to that possibility.

For the fact remains that the Commission, in taking off-the-record actions based on the personal views of the Committee members and necessarily presenting them as adopted Commission policy, could be laying the foundation for other impermissible activities in the name of public benefit. It would be hard to distinguish, for example, in light of the findings and conclusions in *French Telegraph & Cable* (Docket No. 19660) an effort to persuade Great Britain to sever ties with FTC, or to encourage the French not to interconnect with SBS (owned by IBM, Comsat and Aetna) or GTE Telenet, because the sheer size and market power of their parent corporations could tend to inhibit competition. Worst of all, the affected party would never learn what was contemplated or what was done, or be able to seek any redress.

Those parties to this proceeding who protest that policy and procedural safeguards will hinder or impede the Commission's endeavors made nominally on behalf of the American consumer, manifest little faith in the American system of law which requires that administrative agencies, like courts, be on-the-record arbiters, not off-the-record advocates.

## II. THE COMMENTS SUBMITTED EMPHASIZE THE ACUTE NECESSITY FOR SAFEGUARDING THE FUNDAMENTAL DUE PROCESS RIGHTS OF ALL INTERESTED PARTIES

In its Petition for Rulemaking, ITT Worldcom suggested rules which will safeguard the basic due process rights of existing international service carriers. The rules are intended to ensure that all meetings be held with appropriate notice, in an open forum and on the record.

Commenting parties have suggested, however, that it is for the Commission to determine when the public interest would best be served by private meetings.<sup>9</sup> GTE states (*Id.*): "The Commission should be entitled to exercise its discretion to tailor its procedures to the exigencies of the proceeding before it." On the contrary, the determination of what sort of proceedings must be open to the public is not a discretionary one, for an agency, but is dictated by the laws of Congress. Further, the Commission has, in its foreign contacts, no "proceeding before it." That is precisely the point.

SPCC has stated that, rather than resort, at the outset, to the traditional due process protections assured by the Constitution, "the FCC should be given wide latitude in the scope of its consultative discussions with foreign entities . . ." until such time as any interested party "makes a showing that due process has been denied." (SPCC at 3-4). First, those who seek due process have no burden of proving that it has first been denied. Moreover, because the foreign meetings are not part of an existing docket, or based upon an existing record, in what forum shall aggrieved parties complain when it is already too late?

As regards suggested procedural safeguards, Graphnet contends:

"ITT's procedural proposed rules, of course, would preclude any informal exchanges of views or candid discussions of problems between the U.S. and other nations. For formal meetings, with rigid agendas, are

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<sup>9</sup> Comments of GTE, p. 8.

likely to stifle the spontaneous flow of discussion that could lead to real understanding. The requirements for a public transcript and submissions by interested parties could further encumber detailed and candid exchanges."<sup>10</sup>

SBS has candidly complained that, simply because ITT Worldcom's due process proposals "would contribute further toward preclusion of an SBS ability to furnish its services to overseas points other than by interconnection . . ." (SBS Comments, p. 6) they must be ignored at any cost. It further believes that "cumbersome restrictions on Commission conduct in this vital area doubtless will lead to misunderstandings as well as possible misinformation."<sup>11</sup> (*Id.* at 7). It fails to state how any due process restrictions, cumbersome or not, can lead to greater misunderstandings than could be brought about by secret, off-the-record dialogues.

GTE argues that the Sunshine Act does not control because a quorum of Commissioners will not be present, and no "official agency business" is being transpired. (GTE at 6). This is patent nonsense. Although there are only three Commissioner representatives on the Telephone and Telegraph Committee, there can be no doubt that actions of lasting significance will be taking place. It is self-evident that in all such actions, the rights of carriers under Commission jurisdiction must be protected.

Graphnet's Comments, rife with anger and invective, protest (at p. 5) that "ITT seeks to assure that it will be the arbiter of what the Commission may say to overseas representatives and what it may not." (Emphasis in original). Going a step further, SPCC believes that an opportunity afforded interested carriers to comment upon proposed agenda "would be seriously fraught with antitrust ramifications." (SPCC at p. 8). This question was settled disposi-

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<sup>10</sup> Graphnet Comments, p. 9.

<sup>11</sup> See, also, GTE Comments, p. 8:

"The procedures urged by ITT would effectively prevent the Commission from developing an independent expertise and understanding of international issues, and would only promote international misunderstandings."

tively in *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 137-138, (1961) where the Court stated:

"In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."

See, similarly *United Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965), which approved the *Noerr* doctrine in matters involving petitions to administrative agencies and to courts.

ITT Worldcom does not seek to impose its will upon the Commission, but petitions the Commission, instead, to afford all interested parties the right to be heard, guaranteed by the Constitution and the Administrative Procedure Act.

Regarding the potential for prejudgment of pending proceedings, Graphnet makes the unsettling suggestion that such ills could be cured by timely notice of information upon which the Commission intends to rely, with a chance given the affected carriers to rebut or supplement the record. There would, however, be no record of such chance exchanges, but only Commissioners' informal recollections of what they think they heard that might have influenced their ultimate decision-making. No interested party could examine a transcript, subpoena a foreign representative for cross-examination, or otherwise rebut or supplement possibly prejudicial "information" to or from such sources. This

kind of "cure" for interdicted *ex parte* contacts, offers too little, too late.<sup>12</sup>

The Comments of the putative international carriers should be put aside, not simply because they indicate that SBS, SPCC, Graphnet and GTE seek to protect their own interests, but because the means they wish the Commission to utilize are forbidden by virtue of the Constitution and existing law.<sup>13</sup>

It is incumbent upon the Commission to explain, on the record, the legal basis and rationale upon which it intends to act, or engage in a proceeding to determine its proper legal objectives and procedures.

ITT Worldcom respectfully submits that the proposed rulemaking will provide a suitable framework for any forthcoming meetings of Commission and staff with representatives of foreign administrations or telecommunications entities, to ensure that all exchanges take place in a manner consistent with the procedural and substantive rights of all interested parties, including putative carriers.

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<sup>12</sup> SPCC informs the Commission that, should Commissioners or staff members prejudge a pending proceeding, "this information may be elicited at a meeting with foreign entities." (p. 6). This disengenuous proposal apparently indicates that affected carriers must seek information from foreign governments which has been systematically denied them by their own government. Furthermore, SPCC cavalierly advances the suggestion that any Commissioner who has stated anything indicative of pre-judgment could be recused from further proceedings in relevant matters. (p. 7). The mere necessity for recusal would of itself render committee contacts with foreign administrations useless. See ITT Worldcom, Petition for Rulemaking, pp. 8-13, and fn. 5 therein.

<sup>13</sup> There do exist several forums in which the Commission could legitimately participate, including, for instance, various CCITT study groups, attended by interested delegations worldwide, and by interested carriers. ITT Worldcom does not seek to silence the Commission, but only to subject it to the law and Constitution it is sworn to uphold.

**CONCLUSION**

For the reasons stated above, as well as in the Petition for Rulemaking, the Commission should revise its policy and procedures in the manner proposed.

Respectfully submitted,

ITT WORLD COMMUNICATIONS INC.

/s/

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Dated: January 8, 1980.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1721

ITT WORLD COMMUNICATIONS, INC., PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA, RESPONDENTS

**CERTIFIED LIST OF ITEMS IN THE RECORD**

1. Petition for Rulemaking filed by ITT World Communications, Inc. on October 24, 1979.
2. Opposition to Petition for Rulemaking filed by Southern Pacific Communications Company dated December 19, 1979.
3. Comments of Graphnet, Inc. filed on December 19, 1979.
4. Comments of GTE Telenet Communications Corporation filed on December 19, 1979.
5. Comments filed by Satellite Business Systems on December 19, 1979.
6. Comments of RCA Global Communications, Inc. filed on December 19, 1979.
7. Reply Comments of Western Union International, Inc. filed on January 3, 1980.
8. Reply Comments of ITT World Communications, Inc. on January 8, 1980.
9. Reply of RCA Global Communications, Inc. filed on January 8, 1980.
10. Reply to RCA Global Communications, Inc. filed by Graphnet Inc. on January 8, 1980.
11. Memorandum Opinion and Order Denying Petition adopted on April 28, 1980 and released on May 2, 1980.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1721

ITT WORLD COMMUNICATIONS, INC., PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND  
UNITED STATES OF AMERICA, RESPONDENTS.

**CERTIFICATE OF WILLIAM J. TRICARICO,  
SECRETARY,  
FEDERAL COMMUNICATIONS COMMISSION**

I, William J. Tricarico, Secretary, Federal Communications Commission, do hereby certify that the proceeding is a true and correct list of the items comprising a record in the proceedings before the Federal Communications Commission considered pertinent to the above entitled case.

Witness my hand and Seal of the Federal Communications Commission this 11th day of August, 1980.

FEDERAL COMMUNICATIONS COMMISSION

/S/

WILLIAM J. TRICARICO  
*Secretary*

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS INC.,  
67 BROAD STREET, NEW YORK, NEW YORK  
10004 (212) 797-3300 PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

[Filed February 12, 1980]

## COMPLAINT

ITT World Communications Inc. ("ITT Worldcom"), by its attorneys, LeBoeuf, Lamb, Leiby & MacRae, alleges as follows for its complaint:

## JURISDICTION

1. This is an action for declaratory and injunctive relief. The action arises under the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*; the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*; the Freedom of Information Act, 5 U.S.C. § 552; the Government in the Sunshine Act, 5 U.S.C. § 552b; and the Constitution of the United States.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 552(a)(4)(B), and 552b(h)(i) and under 28 U.S.C. §§ 1331, 1337 and 2201.

## PARTIES

3. Plaintiff ITT Worldcom is a corporation organized under the laws of the State of Delaware. Its principal place of business is located at 67 Broad Street, New York, New York.

4. Defendant Federal Communications Commission ("FCC" or "Commission") is an agency of the United States, established by the Communications Act of 1934, as amended, 47 U.S.C. §151 *et seq.* Its principal office is located within the District of Columbia.

**FIRST CLAIM FOR RELIEF**  
**FCC NEGOTIATIONS AND CLOSED MEETINGS**  
**WITH FOREIGN GOVERNMENTS**

5. ITT Worldcom is one of several American companies that provides international record (that is, non-voice) communication services. It is subject to the regulatory jurisdiction of the FCC.

6. In January 1977, the FCC granted applications filed by two companies which had not previously provided international service (the "new carriers"), for certificates under Section 214 of the Communications Act, 47 U.S.C. § 214, to render certain specialized international record communications services between the United States and Europe in competition with ITT Worldcom and other American carriers.

7. In addition to requiring a certificate from the FCC, in order to render international record communication services, an American company must make appropriate operating arrangements with the foreign communications agency or entity with which it wishes to interconnect, that is, which is to provide the other end of the international service. At the time the new carriers received their Section 214 authorizations, they had made no such arrangements. While carriers have almost always entered such agreements prior to seeking authorization from the FCC, the FCC did not require the new carriers to do so, explaining that "we have indicated that the terms and conditions of service specified in these agreements is an important element in our consideration as to whether the services are for the overall public interest. We believe, in this case, our regulatory judgment concerning this element can be as effectively applied prior to initiation of service as prior to authorization." 67 F.C.C.2d at 1040.

8. To date, no European telecommunications entity has seen fit to enter into an operating agreement with the new carriers.

9. In most European countries, telecommunications service is rendered by governmental entities, and not private companies. The unwillingness of these European govern-

ments to enter into agreements with the new carriers has troubled certain members of the FCC. At the time of the FCC decision in October 1978 authorizing a new transatlantic cable ("TAT") which the European governments had supported, FCC Commissioner Fogarty issued a separate statement in which he sought a "tit for TAT." The "tit" was "recognition of our competitive policies and . . . agreements to deal with our multiplicity of carriers." He stated:

"Coupled with the need for circuit planning is the necessity for the foreign correspondents to recognize our competitive policies. Many other foreign correspondents have balked at dealing with more than a small number of United States carriers. The specialized carriers which we have authorized to offer international services have met with almost universal opposition when seeking operating arrangements abroad. Now that the Commission has considered and, to some degree, deferred to the policies and expressed needs of the foreign governments, we should expect "tit for TAT" from the Europeans in terms of their recognition of our competitive policies and their agreement to deal with our multiplicity of carriers. Without such reciprocity, I cannot see how we can give any weight or consideration to the Europeans' internal needs and policies in our future dealings. In the final analysis, reciprocity must be a two-way street, a dialogue rather than a monologue." 71 F.C.C.2d at 99.

10. For several years, representatives of the FCC, through its Telephone and Telegraph Committee and staff, have met with the Canadian (Teleglobe) and European telecommunication administrations and carriers ("CEPT") to discuss "facility planning" (e.g., the laying of a new cable to serve anticipated future needs). These meetings have generally been open meetings to which all interested parties, including ITT Worldcom and the other American international record carriers, have been invited to attend. Recognizing that negotiating with foreign governments is the province of the Department of State (and proscribed to others by the Logan Act, 18 U.S.C. § 953, unless specifically authorized), the FCC has conceded that "the FCC cannot, and should not, negotiate final facilities agreements."

11. It is believed that the FCC, while purporting to recognize that it must avoid negotiations concerning facilities, has in fact used the facility planning meetings to negotiate with foreign governments on behalf of the new carriers. In a telex dated March 20, 1979, the FCC's general counsel virtually conceded that negotiating was occurring at the meetings when he explained that the purpose of these meetings was to "narrow differences and to move towards a consensus." He later went on to explain that "we are concerned about the difficulties involved in reaching agreement on the implementation of new overseas service arrangements. The consultative process may provide a mechanism of increasing cooperation in this area."

12. At a March 22, 1979 meeting in Montreal, to which representatives of the public were invited and a transcript of which was made, Commissioner Fogarty again urged the foreign entities to agree to deal with the "specialized carriers which the Commission has authorized," this time stating that he was speaking for the entire Commission:

"Now, many foreign correspondents, as I understand, have balked already at dealing with more than a small number of United States carriers.

"The specialized carriers which the Commission has authorized already to offer international services have met, as I understand it, with almost universal opposition, from our foreign correspondents, when seeking operating arrangements and agreements abroad.

"Now, I believe that the Commission, as I said, has already gone a long way toward meeting the requirements, needs, and necessities, as our foreign correspondents see it.

"And I would hope, that as we have deferred, in our recent decision, to your needs, as you see them, that you would give us the "tit" for the "tat;" in other words, if you would recognize our competitive policies, and that your agreements would deal with our requirement for multiplicity of carriers in this competitive arena.

"I think the Commission—I can speak for myself and, I'm sure, for the Chairman, and for Mr. Lee, and for the other commissioners who are not present—we want to meet you half way, but we do request, I think,

that the *quid pro quo* would be that you recognize that we are trying to promote competition in the United States, and that competition spreads abroad, and that you would meet our specialized common carriers, and that you would agree to deal directly with them."

13. Between the time of the Montreal meeting in March 1979 and October 1979, no foreign government entered into an operating agreement with either of the new carriers. At the next international meeting in Dublin, Ireland, in October 1979, the discussion of new carriers was moved behind closed doors at a scheduled, but off-the-record (*i.e.*, no transcripts) session. ITT Worldcom and all other American carriers were excluded from this meeting, although privately-owned foreign carriers were permitted to attend. While ITT Worldcom is unaware of what transpired at that meeting, it believes that the principal purpose of the meeting was to persuade the foreign administrations to enter into operating agreements with the new carriers.

14. On October 31, 1979, Chairman Ferris telexed all interested overseas administrations and requested a further meeting. While again explaining that "we are not seeking to negotiate the resolution of differences," he went on to express his concern that "neither of the two new carriers have been able to reach operating agreements with correspondents in the CEPTs."

15. On February 1, 1980, the FCC announced that a further meeting of the representatives of the European and Canadian telecommunications entities would be held in England on February 20-21 (the "England meeting"). The purpose of the England meeting was stated to be "to informally consult on international communications topics of mutual interest. It is expected that the meeting will produce an exchange of views regarding the opportunities for increasing the range and availability of telecommunications services."

16. At a meeting on February 8, an FCC spokesman stated that the purpose of the England meeting would be to review with the CEPT nations recent FCC decisions concerning international service pursuant to which the Commission has authorized additional companies to provide internation-

al record services (although it was not indicated what would be stated that is not in the decisions themselves).

17. The real purpose of the England meeting was recognized by Commissioner Fogarty at the open FCC meeting on January 30: "We are going to London in a couple of weeks to discuss with the European entities the question of allowing the value added carriers and specialized carriers to do business." He went on to explain, when urging that one of the new carrier's Section 214 authorization be extended, that if it were not, "it might be a signal to the European entities that we don't really mean business."

18. So too, the real purpose of the England meeting was recognized by an additional company which is presently requesting FCC authorization to provide international record communications. On February 4, 1980, its counsel wrote to Chairman Ferris of the FCC, indicating that it has been following "with keen interest the Commission's efforts to contact foreign administrations to explain U.S. policy", that it understands that "the time may be right for such discussions to impress upon foreign governments the important public benefits that may be derived from open entry" and concluding "with every good wish for success...."

19. The England meeting is to be another closed and off-the-record meeting, from which ITT Worldcom and other American carriers are to be excluded. ITT Worldcom believes that the FCC representatives will seek to persuade the other attendees to enter into operating agreements with the new carriers.

20. The Commission and its staff plan to participate in future, off-the-record, international meetings from which ITT Worldcom and other American carriers will be excluded and at which the FCC will be negotiating with foreign governments to benefit certain American carriers. At these meetings, representatives of the FCC will be formulating and articulating American policies, which will directly affect ITT Worldcom and other carriers, although the FCC has complied with none of the constitutional and statutory requirements which must precede its so doing. It is anticipated that European entities will take action based on statements made by the FCC representatives although ITT

Worldcom and other interested parties will receive no adequate prior notice of what the Commission is advocating or any reasonable opportunity to comment thereon.

21. The Commission, acting through citizens of the United States without authority of the Department of State, has commenced and is carrying on correspondence and intercourse with foreign governments with the intent of influencing the measures and conduct of those foreign governments in relation to an existing dispute and controversy with the United States.

22. The activities of the FCC described above are unlawful and *ultra vires*, and in excess of the authority conferred on the FCC by the Communications Act, *supra*.

23. On October 29, 1979, ITT Worldcom filed a Petition for Rulemaking with the FCC in which it questioned the Commission's authority to engage in the negotiations and discussions with foreign governments and urged that if they were to go forward, the Commission should adopt rules of policy which delineate clearly the purpose of the meetings and the authority and obligations of the FCC representatives who participate in them, and rules of procedure which will guarantee due process to carriers and other parties who are likely to be affected by the meetings. The FCC has failed to take the requested action.

24. On January 31, 1980, ITT Worldcom, in a letter to Charles D. Ferris, Chairman of the FCC, requested that the FCC direct the Committee and staff to refrain from participation in the proposed February meeting and in any other future private meetings involving representatives of foreign administrations and carriers; or that the Commission postpone any planned secret meetings until the issues raised in ITT Worldcom's Petition for Rulemaking respecting the FCC's authority and its obligations under the Administrative Procedure Act ("APA"), are resolved legally. The Commission has refused to take the requested action and, as indicated in paragraph 15, announced on February 1 that a meeting would be held in England on February 20-21.

25. Plaintiff has exhausted all available administrative remedies. It is entitled to equitable relief since it has no adequate remedy at law.

#### **SECOND CLAIM FOR RELIEF**

##### **Freedom Of Information Act**

26. On October 12, 1979, ITT Worldcom filed a Freedom of Information Act ("FOIA") request with the FCC, seeking, among other things, certain documents relating to the closed Dublin meeting referred to in paragraph 13, and communications involving FCC representatives concerning operating agreements between the new carriers and foreign correspondents.

27. In a letter dated November 16, 1979, the Chief of the Common Carrier Bureau, Philip L. Verveer, responded to ITT Worldcom's request, providing certain of the relevant documents but withholding many others, alleging that the materials withheld were exempt from disclosure.

28. ITT Worldcom filed an Application For Review with the FCC on December 17, 1979 to appeal the denial of the request.

29. Although the FCC's time to make a determination on the appeal has expired, the FCC has not done so.

30. Under the Freedom of Information Act, ITT Worldcom has the right of access to the requested material. Defendant has no legal basis for its action in withholding access to such materials.

31. Plaintiff has exhausted its administrative remedies as provided in the Freedom of Information Act and the FCC regulations.

#### **THIRD CLAIM FOR RELIEF**

##### **Government In The Sunshine Act**

32. Plaintiff repeats and realleges each of the allegations contained in paragraphs 5 through 25 as if set forth fully herein.

33. The Commission is an agency of the United States, and the Commission's Telephone and Telegraph Committee is a subdivision of that agency authorized to act on its behalf, within the meaning of the Government in the Sunshine

Act, 5 U.S.C. § 552b(a)(1) (the "Sunshine Act"). FCC representatives will attend a scheduled meeting on February 20-21, which will be open to representatives of foreign administrations and foreign carriers but will be closed to U.S. carriers, and similar meetings are planned for in the future.

34. The FCC has authorized its representatives to act on behalf of the Commission, and the representatives' deliberations may determine or result in the disposition of official agency business within the meaning of the Sunshine Act, 5 U.S.C. §522b(a)(2), and the FCC's regulations, 47 C.F.R. § 0.601(a) and (b).

35. The FCC representatives intend to make statements and representations regarding U.S. policy, make concessions and commitments to engage support, and otherwise act on behalf of the FCC.

36. The FCC has disregarded the requirements of the Sunshine Act, 5 U.S.C. § 522b and its own regulations governing the conduct of meetings, 47 C.F.R. §§ 0.601-0.607, in participating in a meeting which is closed to public observation, in failing to maintain a complete transcript of the meeting, in failing to provide adequate notice of the meeting, in failing to announce the reasons for holding a closed meeting, and in failing to take other actions required by the Sunshine Act and the FCC regulations.

37. Plaintiff has been injured and will be further injured by the Commission's actions in conducting FCC business in closed meetings in violation of the Sunshine Act.

38. Plaintiff has exhausted its administrative remedies.

WHEREFORE, plaintiff respectfully prays for judgment:

- (1) Declaring that the Commission may not lawfully participate in the proposed meetings;
- (2) Enjoining the Commission from engaging in any meetings or communications of the sort described in the Complaint;
- (3) Declaring that the Commission may not advocate the interests of individual private carriers;
- (4) Enjoining the Commission from negotiating with foreign governments;

(5) Declaring that the Commission has violated the Administrative Procedure Act and enjoining further violations thereof;

(6) Ordering that the Commission provide plaintiff access to the material requested pursuant to the FOIA;

(7) Directing the Commission to comply with the provisions of the Sunshine Act;

(8) Awarding plaintiff reasonable attorney fees and the other litigation costs that it has reasonably incurred;

(9) Granting such other and further relief as the Court may deem just and proper.

DATED: Washington, D.C. February 12, 1980

LEBOEUF, LAMB, LEIBY & MACRAE

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ITT World Communications Inc.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

## ANSWER

## First Defense

Plaintiff has failed to state a claim for which relief can be granted.

## Second Defense

Plaintiff has failed to exhaust its administrative remedies.

## Third Defense

This Court lacks jurisdiction over the subject matter of plaintiff's first claim for relief.

## Fourth Defense

Defendant, the Federal Communications Commission, by its undersigned attorneys, hereby answers the numbered paragraphs of the complaint as follows:

1. This paragraph contains plaintiff's characterizations of the action and not averments of fact to which an answer is required. However, insofar as an answer may be deemed required, the allegations of this paragraph are denied.

2. This paragraph contains plaintiff's jurisdictional allegations and not averments of fact to which an answer is required. However, insofar as an answer may be deemed required, the allegations of this paragraph are denied.

3. Defendant admits the allegations of this paragraph.

4. Defendant admits the allegations of this paragraph.

5. Defendant admits the allegations of this paragraph.

6. Defendant admits the allegations of this paragraph.

7. Defendant admits the allegations of the first and second sentences of this paragraph. Defendant denies the re-

maining allegations of this paragraph except to admit the existence of a Federal Communications Commission decision which appears at 67 F.C.C. 2d 1020, to which the Court is referred for a complete statement of its contents.

8. Defendant lacks sufficient information or knowledge upon which to form an opinion as to the truth of the allegations of this paragraph.

9. Defendant answers the first sentence of this paragraph by averring, upon information and belief, that in some European countries, telecommunications service is rendered by governmental entities. Defendant denies the remainder of this paragraph except to admit the existence of Commissioner Fogarty's statement which appears at 71 F.C.C. 2d 97, to which the Court is referred for a complete and accurate statement of its contents.

10. Defendant admits that meetings of the type described in paragraph 10 have occurred, but denies that its participation in these meetings has violated any constitutional or statutory provisions. The quotation in this paragraph is unattributed, and the Commission is therefore without knowledge to admit or deny it. Defendant further states that its Telephone and Telegraph Committee is now called the Telecommunications Committee.

11. Defendant denies the allegations of this paragraph except to admit the existence of a telex dated March 20, 1979, a copy of which is attached as Exhibit A, to which the Court is referred for a full and complete statement of its contents.

12. Defendant denies the allegations of this paragraph except to admit that the language quoted appears in the transcript of the referenced meeting, a copy of the relevant portion of which is attached as Exhibit B, to which the Court is referred for a full and complete statement of its contents.

13. Defendant lacks sufficient information or knowledge upon which to form an opinion as to the truth of the allegations of the first sentence of this paragraph. Defendant denies the remainder of the allegations of this paragraph except to admit that a conference was held in Dublin, Ireland in October 1979.

14. Defendant denies the allegations of this paragraph except to admit that Chairman Ferris sent a telex to overseas administrations on October 31, 1979, a copy of which is attached as Exhibit C, to which the Court is referred for a full and complete statement of its contents.

15. Defendant lacks sufficient information or knowledge with which to identify the FCC "announcement" alleged in this paragraph and is therefore unable to form an opinion as to the truth of the other allegations of this paragraph.

16. Defendant lacks sufficient information or knowledge with which to identify the FCC "spokesman" referenced in this paragraph and is therefore unable to form an opinion as to the truth of the other allegations of this paragraph.

17. Defendant answers this paragraph by admitting that Commissioner Fogarty made the quoted statements, but defendant denies the remainder of the allegations of this paragraph.

18. Defendant lacks sufficient information or knowledge with which to identify the author of the letter alleged in this paragraph and is therefore unable to form an opinion as to the truth of the other allegations of this paragraph.

19. Defendant denies the allegations of this paragraph.

20. Defendant denies the allegations of this paragraph.

21. Defendant denies the allegations of this paragraph.

22. This paragraph contains conclusions of law and not averments of fact to which an answer is required. However, insofar as an answer may be deemed required, the allegations of this paragraph are denied.

23. Defendant answers this paragraph by averring that plaintiff has filed a petition for rulemaking and that the petition is still pending before the Commission and scheduled for consideration by the Commission on April 22, 1980. Defendant denies the remainder of the paragraph.

24. Defendant admits the first sentence of this paragraph. Defendant answers the second sentence of this paragraph by stating that a conference was held on February 20-21 in England and that three members of the Commission and several Commission staff members were in attendance. Defendant denies all other allegations of this paragraph.

25. This paragraph contains conclusions of law and not averments of fact to which an answer is required. However, insofar as an answer may be deemed required, defendant denies that plaintiff has exhausted its administrative remedies and denies all other allegations of this paragraph.

26. Defendant admits the allegations of this paragraph except to deny the characterization of Dublin conference.

27. Defendant admits the allegations of this paragraph.

28. Defendant admits the allegations of this paragraph.

29. Defendant answers the allegations of this paragraph by averring that it ruled on plaintiff's application on February 20, 1980, and released some additional documents, and properly withheld the remainder.

30. This paragraph contains conclusions of law and not averments of fact to which an answer is required. However, insofar as an answer may be deemed required, the allegations of this paragraph are denied.

31. Defendant admits the allegations of this paragraph.

32. Defendant repeats here each of the answers to paragraphs 5 through 25 and incorporates and adopts the answers by reference.

33. Defendant denies the allegations of this paragraph except to admit that it is an agency of the United States, and that the Telecommunications Committee is one of its subdivisions. Defendant further states that the February 20-21 conference has already been held and that FCC representatives did attend it.

34. Defendant denies the allegations of this paragraph.

35. Defendant denies the allegations of this paragraph.

36. This paragraph contains conclusions of law and not averments of fact to which an answer is required. However, insofar as an answer may be deemed required, the allegations of this paragraph are denied.

37. Defendant denies the allegations of this paragraph.

38. This paragraph contains a conclusion of law and not an averment of fact to which an answer is required. However, insofar as an answer may be deemed required, the allegations of this paragraph are denied.

Defendant denies that plaintiff is entitled to the relief requested or to any relief whatsoever.

Any allegations not hereinbefore specifically answered are denied.

WHEREFORE, defendant requests that this action be dismissed with prejudice and that defendant be granted its costs.

- OF COUNSEL:

ROBERT R. BRUCE

*General Counsel*

KEITH H. FAGAN

*Acting Assistant General  
Counsel*

JOHN P. GREENSPAN

*Counsel*

Federal Communications

Commission

Washington, D.C. 20554

ALICE DANIEL

*Assistant Attorney General  
Civil Division*

CHARLES F. C. RUFF

*United States Attorney*

/s/

VINCENT M. GARVEY

/s/

SURELL BRADY

Attorneys, Department of Justice

10th & Pennsylvania Ave., N.W.

Washington, D.C. 20530

Telephone: (202) 633-5302

## [Exhibit A]

[Telex dated March 20, 1979, from FCC General Counsel Robert R. Bruce to Mr. R. Seguin, Vice-President, Teleglobe, Montreal, Canada]

This is in response to your very constructive March 1, 1979, discussion paper on the North Atlantic facilities planning process. I would like to provide you with my personal views, after detailed discussions with Larry Darby, the Chief, Common Carrier Bureau, on your informal paper and on the future of the consultative process.

This exchange of views was initiated at the Reston meeting and was intended to establish a basis for fuller discussions among the principals. There are, of course, many areas in which much more detailed discussion and careful reflection will be required; but, we found your paper a very lucid and practical beginning for future planning efforts, and an excellent starting point for discussion at the Montreal meeting.

We found the general structure of your paper quite helpful and usefully pragmatic. You have provided a summary of perceptions of the difficulties experienced in the past and suggested some options to deal with these perceived problems. We believe that the success of the consultative process in the future must build on a recognition of both the shortcomings and successes of the processes initiated several years ago.

We have become acutely aware of the difficulties with the process as it has functioned in the past, and you have mentioned many of these difficulties in your paper. We would hope that future discussions could help to identify the precise nature of these difficulties as a prelude for the fashioning of remedies. Such a process could be an integral part of a multidimensional effort to develop improved mechanisms for planning and minimizing the risk of delays, misunderstandings, and other problems which have characterized past planning efforts.

Your paper is rich in detail and unfortunately we have not had the opportunity to accord it the attention it properly deserves. Nevertheless, we would like to share some general, and preliminary observations, which are in large

part provoked by your paper and our informal discussions over the past few months.

1) We believe that it is important to stress that the process will not necessarily have failed if there is no agreement on specific methodologies, planning principles, or even plans. A very significant achievement would be to identify the different approaches being used by the different parties, to narrow differences, and to move toward consensus. It would be useful to identify and understand areas of disagreement as well as to reach agreement on common principles and approaches. The prospects for reducing major conflicts over facilities planning issues may depend significantly on each party's understanding of the detailed rationale and basis for the positions advocated by the others. It seems to us particularly important to understand better where national interests, institutional arrangements, or planning principles cannot be accommodated or compromised in the interest of reaching agreement.

2) We do not believe that the emphasis should necessarily be placed on the establishment of a highly structured planning process with a firmly set charter or the achievement in the consultative process itself of a formally agreed upon plan. These do not seem to be realistic goals from either a U.S. domestic or an international perspective. As has often been observed, the FCC cannot, and should not, negotiate final facilities arrangements. It must remain under U.S. law unhindered to make its best determination about an overall facilities plan; and it cannot be in a position of prejudging or seeming to prejudge any final determinations by reaching prior agreements in an international forum. In our view this limitation, however, does not preclude the FCC from taking fully into account the different methods, plans, and priorities of other telecommunications entities. We see the consultative process as a useful means of obtaining more complete information about the plans and priorities of our foreign telecommunications partners without subjecting sovereign activities to United States regulatory jurisdiction in fact or in appearance. In addition to these domestic considerations, it appears to us that any re-

gional agreement must be sufficiently flexible to be incorporated into global facilities plans.

3) Consultations can be very useful in the initial phases of U.S. procedures as well as after the Commission has developed or reviewed a plan pursuant to its procedures—if international agreement on a plan has not been achieved. North Atlantic telecommunications facilities and services cannot be provided without the concurrence of Canadian, European, and U.S. interests; and mutually acceptable plans and arrangements must be evolved. The FCC is certainly able to participate, as it has in the past, in meetings to explore differences with respect to the facility plans developed under U.S. and foreign procedures. These differences can be taken into account by the Commission as it seeks to identify a mutually acceptable plan which is consistent with the Commission's legal obligations under the Communications Act. Thus, in addition to the alternative of formal intergovernmental negotiations—a further "iterative process" is an available option under present U.S. procedures.

4) We believe that it is important to proceed with a new planning effort before a final determination is made about any facility for the post-1985 planning period. It appears that past efforts to plan effectively may have been hindered because the planning process for the entire period became intertwined with consideration of the construction of a specific cable facility while proposed satellite facilities were not simultaneously considered.

5) In this context, we were impressed by your observation that participants "ran out of time" in the last planning period. We share your sense of urgency about moving ahead in the consultative process. It is almost essential to identify specific facilities decisions and steps necessary to coordinate related decisions at the earliest possible time so that all participants may be able to prepare more effectively. While we are not now in a position to embrace the specific timetables proposed in your paper, we agree that the development of such a timetable is critical. We believe that an expert working group might be able to identify an appropriate calendar of future decisions. Furthermore, while

much of the consultation should be about the period 1985-1990, we believe, as you apparently do, that the planning horizon should be extended to the extent feasible beyond a five year incremental period.

6) We also agree with you that in the early stages of a planning process participants can, and should, focus on the basic "building blocks" of decisions: methodologies, data bases, and planning principles. These are useful to all sides and in all arenas. In addition, we expect that there may well be significant changes in the technology of transmission systems which might have an important bearing on facilities decisions made in the near future. Thus, technology assessment and evaluation may be another area of useful interchange in the early stages of the consultative process.

7) We recognize that there has been concern about seemingly unilateral decisionmaking by the United States in the area of facilities planning. An effective consultative process should ameliorate this concern. On the other hand, we are concerned about the difficulties involved in reaching agreement on the implementation of new overseas service arrangements. The consultative process may provide a mechanism for increasing cooperation in this area.

8) We envision an increasing convergence of domestic and international policy considerations, and we believe that a consultative process can provide a direct and candid means of exchanging views on many regulatory and policy issues of mutual concern—domestic and international. Thus, we believe that the Montreal and subsequent meetings should begin to develop an agenda of these important new issues which reach beyond present concerns about facilities planning.

9) We believe that the exact nature of the consultative process and its integration into the domestic procedures in the U.S. and elsewhere will require further detailed study. It does not appear to be possible to resolve these important issues at Montreal. We hope that they will be pursued with some sense of urgency in the coming months.

10) These comments are, of course, by no means comprehensive and reflect only our initial personal views on this

important subject. We are looking forward to seeing you again in Montreal and further addressing these important policy issues.

ROBERT R. BRUCE  
GENERAL COUNSEL  
FEDERAL COMMUNICATIONS  
COMMISSION

## [Exhibit B]

[Excerpts from transcript of meeting, March 22, 1979, in  
Montreal, Canada]

\* \* \*

By Mr. Delorme: Merci! Commissaire Fogarty, vous avez la parole!

By Mr. Fogarty:

Thank you, Mr. Chairman. Thank you, Mr. Chairman! If I may add to the comments already on the record, from our Chairman, and from my distinguished colleague, Mr. Lee, I'd like to suggest that after listening to the debate and discussion here today, that I think it's essential that our friends from Teleglobe, and the European counterparts, recognize that in the adoption of the memorandum "Opinion and Order", of March sixteen (16), the commission has gone a long way in an attempt to implement Comity.

I'd like to suggest also, Mr. Chairman, that I might disagree, in some degree, with your comment that it may be premature, at this time, to consider new and novel services.

In my attempt to digest the material that has been presented before the commission, with respect to this issue, I have found it paramount to make a determination that Tat seven (7) really is in the American public interest, and I remain convinced today ... unconvincing today that we really need the cable to service the public interest.

However, more must be considered ... more must be considered, and that's what Comity comes into play.

And I'd like to suggest that, as part of these future discussions, we must not only determine a common methodology for estimating circuit needs, and I note that representative of A.T. and T., Mr. Nichols, suggests that by nineteen eighty-four (1984) there will be a need for ten thousand (10,000) additional circuits.

I would like ... I would like to suggest that our working group consider planning and estimating circuit needs for this planning period, and then, thereafter, decide to negotiate the need for facilities to meet these requirements.

Now, coupled with the need for circuit planning, in my view, is the necessity for our friends, our foreign correspondants, to recognize the competitive policies that have already been adopted by the Federal Communications Commission.

Now, many foreign correspondants, as I understand, have balked already at dealing with more than a small number of United States carriers.

The specialized carriers which the commission has authorized already to offer international services has met, as I understand it, with almost universal opposition, from our foreign correspondants, when seeking operating arrangements and agreements abroad.

Now, I believe that the commission, as I said, has already gone a long way toward meeting the requirements, needs, and necessities, as our foreign correspondants see it.

And I would hope, that as we have deferred, in our recent decision, to your needs, as you see them, that you would give us the "tit" for the "tat"; in other words, if you would recognize our competitive policies, and that your agreements would deal with our requirement for multiplicity of carriers in this competitive arena.

I think the commission—I can speak for myself and, I'm sure, for the Chairman, and for Mr. Lee, and for the other commissioners who are not present—we want to meet you half way, but we do request, I think, that the quid pro quo would be that you recognize that we are trying to promote competition in the United States, and that competition spreads abroad, and that you would meet our specialized common carriers, and that you would agree to deal directly with them.

\* \* \*

## [Exhibit C]

[Telex dated October 31, 1979, from  
FCC Chairman Charles D. Ferris  
to overseas telecommunications administrations]

02 Washington DC 31 Oct 79 2320GMT

Mr. Thorsten Larsson Chairman OEPT/CLTA  
Central Administration of  
Swedish Telecommunications  
S-123 86 Farsta Sweden

Copies To:

Mr. F Zimmermann  
General Postdirektion  
Postgasse 8  
A-1011 Wien Austria

Mr. A. Theys  
Regie Des Telegraphes Et Des  
Telephones  
Administration Generale  
2E Bureau  
42, Rue Des Palais  
B-1030 Bruxelles Belgium

Mr. H Pedersen  
Generaldirektoratet For Telegrafvaesenet  
Anker Heegaards Gade 4  
DK 1007 Koebenhavn K Denmark

Mr. R. Alander  
Post-OCH Telegrafstyrelsen  
Box 528  
SF-00101 Helsinki 10 Finland

Mr. J. Grenier  
Direction Generale Des  
Telecommunications  
Direction Des Affaires Industrielles  
Et Internationales  
20, Avenue De Segur  
F-75700 Paris France

Mr. H. Wirz  
Ministerium Fur Das Post

Und Fernmeldewesen  
Adenauerallee 81  
D-53 Bonn Fed Rep Of Germany

Mr. S. O'Droma  
Dept Posts and Telegraphs  
Marlborough Street  
Dublin Ireland

Mr. E. Brizzi  
ITALCABLE  
Via Calabria 46-48  
I-001 Roma Italy

Mr. C Marcolin  
Telespazio Sia Per Le  
Communicationi Spaziali  
Corso D'Italia, 43  
I-00198 Roma Italy

Mr. Kisch  
PTT Headquarters  
Avenue Monterey E A  
Luxembourg Luxembourg

Mr. B. Bakker  
Direction General Des Postes, Des  
Telegraphes Et Des Telephones  
Dept Des Affaires Internationales  
12, Kortenaerkade  
The Hague Netherlands

Mr. P. Rabbas  
Teledirektoratet  
Postboks 6701  
St Olavs Plass  
Oslo 1 Norway

Mr. J. Saraiva-Mendes  
Companhia Portuguesa Radio Marconi  
Praca Marques De Pombal 15  
Lisboa 2 Portugal

Mr. L. Terol  
Compania Telefonica Nacional  
De Espana

Plaza De Esfana, 3  
Madrid-13 Spain

Mr. G. Baggensos  
Direction Generale Des PTT  
Viktoriastrasse 21  
CH-3000 Berne 14 Switzerland

Mr. W. Danke  
Radio Suisse S A  
Schwarztorstrasse 61  
CH-3000 Berne 14 Switzerland

Mr. J. Hodgson  
External Telecommunications  
Executive  
Alder House  
1 Aldersgate Street  
London ED1A 1AL United Kingdom

Dear Chairman Larsson:

As we agreed at our informal meeting in Dublin on October 3, I am sending you this Telex, with copies to your CEPT colleagues and a similar telex to Teleglobe Canada, to further define our proposal to broaden the range of subjects on which we consult. I believe there may well be some topics which you and your colleagues think would be useful subjects for informal consultations.

The existing consultations process has provided an opportunity for the participants to exchange views on our respective policies with respect to international telecommunications facilities. It is my hope that through such discussions we can better understand the basis for our respective decisions. I believe that a like mechanism is needed in other areas of mutual interest to the United States, CEPT, and Canada.

I would welcome your views on topics for discussion. At this point I believe there is a need for an exchange of views on questions pertaining to new and existing services between the various CEPT nations and the United States and the introduction of new carriers between the U.S. and the CEPT nations.

There is in the United States a growing appreciation that competition in telecommunications has produced benefits for consumers of telecommunications services. We have observed domestically both the introduction of new services and significant improvements in the provision of existing services. In the process, a significant number of applications have been filed by new carriers seeking to provide services within the U.S.

Recent applications have required the Commission to consider similar issues in the international arena. In 1977, the Commission found that the U.S. users of international telecommunications would benefit from new data services between the United States and certain CEPT countries. These services were to be provided by existing U.S. international carriers and by two new U.S. international carriers. However, neither of the two new carriers have been able to reach operating agreements with correspondents in the CEPT countries to which the Commission authorized them to provide service. Consequently, the benefits to the public which the Commission found would result from the operation of these new carriers have not been realized.

I understand that there may well be differences between the policies of the CEPT nations and those that are developing in this country. The ongoing consultative process has been a useful means for exchanging views on North Atlantic facilities policies, and I believe that consultation on these other subjects can yield similar benefits.

With regard to the structure for such discussions, I would suggest that the exchange of views on topics other than international facilities planning should take place in a process separate from the existing consultative process. I also believe that while a defined structure for this exchange is desirable, the procedure adopted should be as informal as possible. I would stress that, as in the case of our participation in the facilities consultative process, we are not seeking to negotiate the resolution of differences but only to establish a mechanism to facilitate the exchange of information and views on these additional issues.

It was apparent from our brief discussion in Dublin that our differing industry and government structures and legal

processes make the establishment of even an informal exchange of views a somewhat complex undertaking, certainly, the Commission must act within the restraints placed on its actions by applicable U.S. law and the internal proceedings which may be necessary to enable it to participate in such an exchange of views. For this reason our proposal at Dublin was limited to the suggestion that an informal working group be formed to explore the topics on which the exchange of views might be useful and to discuss a structure for effecting consultation on these subjects. I continue to believe that a relatively small informal working group is the best means for developing an agenda of topics for discussion and a mechanism for effecting such an exchange.

I am optimistic that discussions such as I have described will lead to better understanding on both sides of the Atlantic. Such understanding may help us fashion, through our own internal processes, policies that are acceptable to all parties and that will best serve all our consumers. I look forward to receiving your views on topics for discussion and a structure for such consultations after your upcoming meeting.

Warm Regards

**CHARLES D. FERRIS**

Chairman

Federal Communications Commission

Washington, DC

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

**AFFIDAVIT OF ROBERT E. GOSSE**

I, Robert E. Gosse, being first duly sworn, hereby de-  
pose and say:

A. During the time period the materials described below  
were prepared, I served as an attorney in the International  
and Satellite Facilities Division, assigned to the International  
Program Staff.

B. As part of my duties in the above position, I assisted  
in the preparation of or became personally familiar with the  
documents described below which were subsequently with-  
held from release to plaintiff ITT World Communications,  
Inc. following its request pursuant to the Freedom of Infor-  
mation Act which is the subject of this lawsuit.

1. Documents pertaining to an off-the-record meet-  
ing on October 3, 1979 among representatives of  
CEPT, Teleglobe Canada, NTIA, DOS and FCC in  
Dublin, Ireland, including:

a. Handwritten notes I took concerning the  
meeting.

b. Handwritten notes taken by James Warwick.

c. Typewritten draft of a compilation of James  
Warwick's and my notes prepared by me.

d. Copy of typewritten draft of the compilation of  
notes as described in "b" above with James  
Warwick's suggested changes.

e. Copy of typewritten draft of compilation of  
notes as described in "b" above with Thomas J.  
Casey's suggested changes.

2. Drafts of the October 31, Telexes in #2 of Attach-  
ment 1 of the Commission's Memorandum Opinion and  
Order of February 20, 1980, from Chairman Ferris to  
Mr. Torsten Larsson, Chairman of CEPT/CLTA,

Central Administration of Swedish Telecommunications prepared on the following dates:

- a. 10/24/79
- b. 10/26/79
- c. 10/29/79
- d. 10/30/79
- e. 10/30/79
- f. 10/31/79

3. Draft of October 31 Telex in #1 of Attachment I from Chairman Ferris to Mr. DeLorme on October 30, 1979.

4. Memorandum dated August 25, 1976 from Joel W. Winnik, Esq. to Walter R. Hinchman, Chief, Common Carrier Bureau, on the subject of Applicability of Resale Decision to International Communications market.

5. A one page section entitled "Expansion of Areas of Consultative Contact" of a 28 page memorandum prepared by James Warwick and me on September 1, 1979, for background for FCC attendees of the Dublin, Ireland Conference.

C. In my judgment, based upon my understanding of the Freedom of Information Act, I believe the above materials fall within Exemption 5, (5 U.S.C. § 552(b)(5)): Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

D. The materials described in #1 may be used by the staff in making recommendations to the Commissioners concerning future consultative meetings where Commissioners and representatives of foreign telecommunications entities exchange ideas and data on matters involving foreign telecommunications.

E. The materials described in #2 and #3 are preliminary drafts of Telexes. Although the final drafts were released, the drafts contain various suggestions by the staff as to how the former should be worded, and are predecisional.

F. The memorandum in #4 which I did not prepare, but am personally familiar with, consists of advice and conclusions that were prepared by a staff attorney for the consideration of the Bureau Chief. It is replete with advice, opin-

ions and legal analysis and contains no segregable factual material.

G. The memorandum described in #5 was prepared by myself and James Warwick to assist the Commissioners attending Dublin meetings. The relevant segment contains some background information and opinions and options based upon the background material. Because this background information is presented to assist in the formulation of opinions, advice and options, no segregable factual material is contained therein.

/s/ Robert E. Gosse

[dated JUNE 2, 1980]

**PUBLIC NOTICE**  
**Federal Communications Commission**  
**1919 M Street, NW**  
**Washington, D.C. 20554**

February 1, 1980

**MEETING TO BE HELD TO DISCUSS THE**  
**FEBRUARY 20-21, 1980 MEETING OF**  
**U.S. REPRESENTATIVES WITH**  
**EUROPEAN AND CANADIAN**  
**TELECOMMUNICATIONS ENTITIES**

Members of the Commission's Staff will convene a meeting at 2:00 p.m. on February 8, 1980 in Room 511, 1919 M Street, NW., Washington, D.C. to discuss a meeting of representatives of United States, European and Canadian telecommunications entities concerned with international communications to be held in the United Kingdom on February 20-21, 1980. The purpose of the February 20-21 meeting is to informally consult on international communications topics of mutual interest. It is expected that the meeting will produce an exchange of views regarding the opportunities for increasing the range and availability of telecommunications services.

The purpose of the February 8 meeting being convened by the staff is to discuss topics for U.S.-Europe-Canada informal consultations which interested parties wish to suggest. The February 8 meeting is open to the public and all interested parties are invited to participate.

For additional information contact Will Demory (202) 632-3214.

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

FOIA 9-192

In the Matter of  
ITT World Communications Inc.  
On Request for Inspection of Records

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 14, 1980      Released: February 20, 1980**

By the Commission:

1. The commission has under consideration the Freedom of Information Act (FOIA)<sup>1</sup> determination of the Chief, Common Carrier Bureau and the General Counsel entered on November 15, 1979, and an application for review of that decision filed by ITT World Communications Inc. (ITT) on December 17, 1979.<sup>2</sup>

2. ITT seeks access to all documents bearing upon or relating to: (a) communications involving the Commission and representatives of foreign entities attending the recent US/CEPT/TELEGLOBE meeting in Dublin, Ireland;<sup>3</sup> (b) communications involving the Commission and any person with respect to dealings between foreign correspondents and U.S. carriers not now providing direct international services; and (c) the willingness of foreign correspondents to consider dealing with U.S. carriers not now providing di-

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<sup>1</sup> U.S.C. § 552; 47 C.F.R. § 0.461.

<sup>2</sup> ITT also filed a letter supplement to its application for review on December 26, 1979.

<sup>3</sup> This conference was held on October 2-3, 1979, and was a result of the authorization of an additional transatlantic submarine cable (TAT 7). *See, e.g., AT&T Co.*, 73 FCC 2d 248 (1979). The Dublin conference was but one aspect of a planned international consultative process initiated to assure that future decisions relating to facilities authorizations are based upon the fullest factual record and a knowledge of the methodologies and data bases used by the European government correspondents. Such international conferences are designed to exchange views between government entities.

rect international services. In its ruling, the staff permitted release of eight (8) categories of records; it declined access, however, to fifteen other classes of information upon the ground that these documents consisted of internal agency memoranda insulated from inspection by Exemption 5 of the FOIA. 5 U.S.C. § 552(b)(5).<sup>4</sup> The staff indexed and described the fifteen documents which were withheld from inspection. Annexed hereto is Attachment I describing the documents released. Annexed also is Attachment II with expanded descriptions of the items being withheld. Seven categories of documents withheld were related to the Dublin conference. Of the remaining eight, one is a memorandum from a staff attorney to a Bureau chief, another is a memorandum from a Commissioner to the Chairman, and the remaining six are memoranda to Commissioners from their legal assistants.

3. On appeal, ITT presents several arguments why inspection of the withheld documents should be granted. The requester asserts, respecting the records relating to the Dublin conference, that Exemption 5 does not apply because: (1) the contents of the documents were disclosed to foreign governments and corporations;<sup>5</sup> (2) the documents reflect final agency opinions or adopted policy; and (3) the records indicate that the agency has engaged in *ultra vires* actions. Moreover, with respect to all the withheld records, ITT urges that the Commission permit discretionary access and, in any event, that all segregable factual portions should be disclosed.

4. As to its first argument, that certain of the documents have lost their privileged-deliberative status since their substance or purport was disclosed during the course of discussions with other Dublin conferees, ITT's contention

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<sup>4</sup> Exemption 5 provides that "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" are not subject to mandatory disclosure. 5 U.S.C. § 552(b)(5). See *EPA v. Mink*, 410 U.S. 73 (1973).

<sup>5</sup> In its supplement, ITT claims that any disclosures made at this meeting would have not only involved foreign governments, but privately owned foreign carriers who were also in attendance.

must fail. At the outset, it should be emphasized that the purpose of Exemption 5 is to protect the "consultative functions" of government by furthering open and frank discussions within and between agencies concerning government policies. *EPA v. Mink, supra*, 410 U.S. at 87. If discussions conducted among government officials and their foreign partners could, in this context, automatically trigger a waiver of Exemption 5's protection, it would effectively destroy the underlying purpose for which Exemption 5 was enacted. See also *Carlisle Tire & Rubber Co. v. Customs Service*, Nos. 78-2001, 78-2002, 79-1224, D.D.C., Nov. 21, 1979. Consequently, this result would seriously impair the candid exchange of views necessary for the Commission to discharge its statutory responsibilities. Cf. *Murphy v. Department of the Army*, No. 78-1258, D.C. Cir., Dec. 21, 1979. Moreover, it has been held that "limited disclosures to proper outside persons as are necessary to carry out effectively a purpose for assembling a governmental report in the first place do not waive its privilege." *Cooper v. Department of the Navy*, 558 F.2d 274, 278 (5th Cir. 1977), cert. denied, No. 79-171, U.S. Sup. Ct., Oct. 29, 1979. Accordingly, if limited disclosures to "proper outside persons" do not waive the deliberative privilege then *a fortiori* discussions among governmental officials do not invalidate the protection accorded privileged materials by Exemption 5.<sup>6</sup> See also *Gulf & Western Industries, Inc. v. United States*, No. 79-1646, D.C. Cir., Nov. 6, 1979.

5. In the instant case, no evidence has been presented by ITT, and we know of none, that the documents or their contents were ever disclosed to any unauthorized person. For example, Item No. 1, encompassing six (6) categories of records, was prepared by FCC staff personnel after the meeting, and thus could not have been disclosed to the conferees. Items 2 and 3 are preliminary drafts of Telexes, the final versions of which were released. Items 5-7 are confi-

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<sup>6</sup> In this context, the agency's communication is deemed "deliberative" where it relates "to the process by which policies are formulated." *Jordan v. Department of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (*en banc*).

dential briefing memoranda prepared by agency attendees and no disclosure of these documents has been made.<sup>7</sup> Item 8 is an unused draft of a speech prepared for, but not delivered by, the Commission's Chairman. Obviously, this undelivered speech was not disclosed. Further, ITT advances no precedential support for the proposition that an otherwise confidential document loses its privileged character because the recipient gleans information therefrom or that it otherwise influences the recipient's thinking if manifested in subsequent conversation. Indeed, the cases, as discussed above, suggest a contrary result. If ITT's proposition were the case, no agency document could retain its privileged status unless the recipient took no action after receiving the confidential information. As we understand the rationale underlying Exemption 5, it was precisely enacted to protect confidential communications between decisionmakers in order to assist them in reaching informed decisions, and to insulate the public from the "confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon." *Jordan v. Department of Justice, supra*, 591 F.2d at 772-73.

6. Moreover, while we are mindful that the FOIA requires agency disclosure of "those statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register," 5 U.S.C. § 552(a)(2)(B), the documents at issue do not meet that description. ITT suggests that the withheld documents "may merely include statements and interpretations of such adopted policy." In this line, ITT seeks support from *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), which requires the disclosure of final opinions and interpretations which embody an agency's effective law and policy. 421 U.S. at 152. ITT contends that "the Commission has already decided to meet with foreign telecommunications entities, and begun to act upon a policy which it has not yet fully disclosed." We disagree.

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<sup>7</sup> See note 10 *infra* re: segregable factual material.

7. In no sense of the term do these documents constitute the "working law" of the agency. *NLRB v. Sears, Roebuck & Co.*, *supra*, 421 U.S. at 152-53. The documents do not, and cannot, represent final agency action. The Dublin meetings, attended by three of the seven Commissioners, was a consultative conference between appropriate telecommunications entities exclusively designed to exchange views on future transatlantic telecommunications matters. The Commissioners at this meeting did not, and as a matter of law could not, adopt policies pending before the Commission since they did not constitute a majority of the Commission. The memoranda generated by Commission staff as a result of this conference do not represent final agency action nor did the documents prepared in advance of the meeting in any way constitute statements adopted by the agency. The records sought are precisely the kind of predecisional communications that Exemption 5 is designed to protect. *See Jordan v. Department of Justice, supra*, 591 F.2d at 772-74. Thus, the records are immune from discovery.

8. ITT further argues that nondisclosure cannot be sustained by the staff's concern that disclosure would compromise a critical means by which the United States gains insight into the status of foreign governments' telecommunications policies. ITT contends that the Commission lacks the requisite legal authority to negotiate with foreign governments.<sup>8</sup> It therefore concludes that the Commission's participation is *ultra vires* and the documents cannot be deemed exempt. This proposition is clearly erroneous. The Commission, along with other authorized governmental agencies, attends these conferences to share and exchange points of view regarding future international telecommunications planning. The Commission must attend such conferences in order to discharge its non-delegable duty to authorize international wire and radio communications in the public interest (*See* Titles II and III of the

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\* ITT indicates that it has filed a Petition for Rulemaking (RM-3523) addressing the proposition that meetings between the Commission and foreign administrations may constitute *ultra vires* activity.

Communications Act of 1934, as amended, 47 U.S.C. Titles II and III and the Communications Satellite Act of 1962, 47 U.S.C. § 701-744) and to regulate "interstate and *foreign* commerce in communications so as to make available . . . to all the people of the United States a rapid, efficient . . . *world-wide* wire and radio communications service with adequate facilities at reasonable charges. . . ." 47 U.S.C. § 151. (Emphasis added.) In accordance therewith, the Commission is obligated to determine the merits of international facilities applications and the rates charged thereunder as they are filed by the carriers. In view of the Commission's statutory responsibilities and the necessity to cooperate with foreign entities in this ongoing facilities planning process, ITT's assertion is plainly incorrect.

9. ITT also requests that the Commission invoke its discretion and release the withheld records, or, in any event, release any segregable factual portions contained therein. The requester notes that agencies have been encouraged to make disclosure where it would not cause significant harm to governmental interests.<sup>9</sup> ITT states that the rule requires a weighing of policy considerations and that here the circumstances warrant disclosure. *See* 47 C.F.R. § 0.461(f)(4). It also states that all segregable factual materials must be disclosed. *EPA v. Mink, supra*, 410 U.S. 73.

10. We have carefully reviewed the staff's initial action and find that it should be affirmed.<sup>10</sup> The documents were properly withheld pursuant to Exemption 5. Thus, Item No. 15 consists of predecisional recommendations from one Commissioner to another. The six memoranda from staff

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<sup>9</sup> *EPA v. Mink, supra*, 410 U.S. 73, 80; *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971); Department of Justice, *Policy Guide: When to Assert the Deliberative Privilege Under Exemption 5*.

<sup>10</sup> Upon review, however, we believe that Item 6 and portions of Items 7 and 10 are factual in nature and not otherwise inextricably intertwined with exempt material. Consequently, they must be released. *See Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). The material being released here should be distinguished from factual summaries and other factual material that are an integral part of staff analysis and recommendations. The latter are entwined in the deliberative process and are therefore exempt. See footnote 11, *infra*.

assistants to Commissioners (Items 9-14) are replete with advice, opinions, alternatives and recommendations. They were submitted as guidance for the Commissioners during their deliberations. The memoranda are deliberative in nature and are an integral part of the agency's decision-making process. Item No. 4 consists of the legal advice and opinions of an attorney to a bureau chief. The Dublin conference and the various memoranda related thereto were likewise intended to assist the Commission in gathering information concerning international facilities matters which ultimately will be presented for its determination. The memoranda are therefore deliberative and predecisional materials. The release of the documents ITT seeks would seriously erode the Commission's ability to secure the candid and uninhibited advice of its staff as well as that of foreign entities. Hence, communications of this nature must remain confidential. *NLRB v. Sears, Roebuck & Co.*, *supra*, 421 U.S. at 175. *Sterling Drug, Inc. v. FTC*, 450 F.2d 698 (D.C. Cir. 1971); *Jordan v. Department of Justice*, *supra*. We also find that factual summaries, culled by the staff from the public record to assist the Commission in reaching a decision, are similarly exempt from mandatory disclosure since they constitute the staff's view of the facts which Commissioners should give priority to in their consultations and in making subsequent decisions.<sup>11</sup>

11. We adhere to the principle, as did Congress in its design of Exemption 5, that privileged governmental communications should be shielded in order to protect the "consultative functions" of government absent some strong countervailing circumstances. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd*, 384 F.2d 919, *cert. denied*, 389 U.S. 952 (1967); *Grumman Aircraft Eng. Corp. v. Renegotiation Bd.*, 482 F.2d 710 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 168 (1975). The Commission has not reached any decision on

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<sup>11</sup> See *Montrose Chemical Corp. v. Train*, 491 F.2d 63 (D.C. Cir. 1974). See also *Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 250 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Mobil Oil Corp. v. FTC*, 406 F. Supp. 306, 315 (S.D.N.Y. 1976). But see footnote 10, *supra*.

the matters which the Dublin conference addressed; but the materials in Item No. 1 may be used by the staff in making recommendations to the Commission on such matters. Thus, disclosure of the notes in Item No. 1 would inhibit the free flow of communications necessary to effective decision-making. The prospect of disclosure would, in our view, tend to discourage these candid exchanges vital to the development of effective international facilities planning. We conclude therefore that discretionary release would impair the integrity of the decisional process which commands that "officials be judged by what they decided, not for matters they considered before making up their minds." *Grumman Aircraft Eng. Corp. v. Renegotiation Bd.*, *supra*, 482 F.2d at 718. ITT has advanced no compelling public interest reason as to how the public generally will benefit from release of this exempt information; and, therefore, the potential for harm to efficient governmental policy formulation is not counterweighted by any prospect that discretionary release will promote the public interest.

12. Accordingly, IT IS ORDERED, that except as otherwise indicated herein, the Application for Review filed on behalf of ITT World Communications Inc. IS DENIED. Judicial review of this decision may be sought pursuant to 5 U.S.C. § 552(a)(4)(B).

The officials responsible for this action are the Following Commissioners: Charles D. Ferris, Robert E. Lee, James H. Quello, Abbott Washburn, Joseph R. Fogarty, Tyrone Brown, Anne P. Jones.

FEDERAL COMMUNICATIONS COMMISSION  
WILLIAM J. TRICARICO  
*Secretary*

**ATTACHMENT I**  
**Material Available for Inspection**

Copy of Telex from Chairman Charles Ferris to Mr. Jean-Claude Delorme, President of Teleglobe Canada, as transmitted on October 31, 1979, regarding policy positions taken at Dublin, Ireland meeting.

Copy of Telex from Chairman Charles Ferris to Mr. Torsten Larsson, Chairman of CEPT/CLTA, Central Administration of Swedish Telecommunications, as transmitted on October 31, 1979, regarding policy positions taken at Dublin, Ireland meeting.

Five pages, pp. 106-11, of Transcript of CEPT/U.S.A./Teleglobe Canada, concerning consultative process on North Atlantic Telecommunications, Montreal, Canada, March 22-23, 1979.

Telexes, 8/5/77, 6/3/77.

A letter dated March 1, 1979, to Mr. Robert Bruce, FCC, from Mr. Robert Seguin of Teleglobe Canada, with attachments.

Letter dated September 21, 1979, to Commissioner Fogarty from Bertram B. Tower, ITT World Communications.

Telex dated March 13, 1979 from Robert Seguin of Teleglobe Canada to Robert R. Bruce, Esq., General Counsel, FCC and Mr. Enrico Brizzi, of Italcable, Rome, Italy, concerning a conference report to be given at the Montreal, Canada, March, 1979 consultative meeting.

Telex dated March 20, 1979 from Robert R. Bruce, Esq., General Counsel, FCC to Mr. Enrico Brizzi, Chairman, CEPT/STA, Italcable, Rome, Italy, concerning the future of the consultative process.

**ATTACHMENT II**  
**Material Not Released for Inspection**

1. The following transcripts and comments regarding an off-the-record meeting on October 3, 1979, among representatives of CEPT, Canada, NTIA, DOS and FCC in Dublin, Ireland, including:
  - a. Handwritten notes of R.E. Gosse, Esq.—8 pages.
  - b. Handwritten notes of James Warwick, dated 10/3/79—4 pages.
  - c. Typewritten draft of compilation of Gosse and Warwick notes prepared by R.E. Gosse, Esq. dated October 12, 1979, and titled "Notes of Informal Meeting of CEPT/TELEGLOBE/US pertaining to expansion of the areas of consultative contact." See paragraphs 10-11 of the text of the decision—11 pages.
  - d. Copy of typewritten draft of compilation of notes as described in "c" above with James Warwick's suggested changes—11 pages.
  - e. Copy of typewritten draft of compilation of notes as described in "c" above with Thomas J. Casey's, Esq. suggested changes—11 pages.
  - f. Handwritten note from Thomas J. Casey, Esq. to Robert E. Gosse, Esq. regarding typewritten compilation—1 page. (This document will be disclosed.)
2. Drafts of the October 31, Telexes in #2 of Attachment I from Chairman Ferris to Mr. Torsten Larsson, Chairman of CEPT/ELTA, Central Administration of Swedish Telecommunications on the following dates:
  - a. 10/24/79
  - b. 10/26/79
  - c. 10/29/79
  - d. 10/30/79
  - e. 10/30/79
  - f. 10/31/79

The final version of these preliminary drafts was released.

3. Draft of October 31 Telex in #1 of Attachment I from Chairman Ferris to Mr. DeLorme on 10/30/79.

A copy of the finalized telex was also released.

4. Five-page memorandum dated August 25, 1976 from Joel S. Winnik, Esq. to Walter R. Hinchman, Chief, Common Carrier Bureau, on subject of Applicability of Resale Decision to international communications market. The document consists of staff attorney's legal interpretations of the implications of certain Commission decisions. The memorandum addresses various questions regarding the applicability of the *Report and Order in Docket No. 20097* (Resale Decision) to Section 214 authorizations to serve international points, in general, and in particular, to the applications of Graphnet Systems, Inc. to supplement its present authority to serve Hawaii and to serve various European points, and the application of Telenet Communications to extend its packet-switched circuits to the United Kingdom and points beyond.

5. One page section of Memorandum (28 pages) entitled "Expansion of Areas of Consultative Contact" prepared by R.E. Gosse, Esq. and James Warwick in September, 1979, for background for FCC attendees of Dublin, Ireland Conference. The pertinent section consists of staff recommendations.

6. Background memo consisting of 21 pages undated from Russell Frisby, Esq. to James Smith, Esq. prepared in September, 1979, for FCC attendees of Dublin, Ireland, regarding Section 214 Applications for provision of International Service. This document is being released. The document is a factual summary of Section 214 application proceedings which have evoked responses from European countries.

7. Background memo undated from Russell Frisby, Esq. to James Smith, Esq. for FCC attendees of Dublin, Ireland prepared on subject of CCI and International Television. The first two pages of this 9 page memo consist of a summary of factual material which will be released. The residue includes summaries, characterizations and staff views concerning matters which might arise in discussion at the Dublin conference.

8. Unused draft consisting of 27 pages (undated) prepared by his staff for Chairman Ferris' opening remarks for Dublin, Ireland conference.

9. One page memorandum dated April 26, 1979 prepared by Sebastian A. Lasher for Commissioner Abbott Washburn containing recommendations for an agenda item regarding the revision of authorization of Graphnet Systems, Inc. to comply with decision of U.S. Court of Appeals, 2nd Circuit in No. 77-4928.

10. Intra-office memorandum, dated December 16, 1976, consisting of 6 pages, to Commissioner Fogarty from Angela Shaw, the Commisioner's Attorney-Advisor, on the subject of the December 10, 1976 Reston meeting with carriers on transatlantic cable and satellite licensing, the last four pages of which are factual in nature and will be released. The remainder does not contain any factual material that is segregable from deliberative material, but consists of a staff member's recommendations regarding the issues to be discussed.

11. Undated two page intra-office memorandum to Commissioner Fogarty from Lawrence Katz, Attorney-Advisor to the Commissioner, summarizing Common Carrier No. 1 (TAT-7, Docket No. 18875 Reconsideration), Special Meeting of October 25, 1978, re: TAT-7, Docket No. 18875 reconsideration, and containing a staff member's recommendations.

12. Undated two page intra-office memorandum to Commissioner Fogarty from Lawrence Katz, the Commissioner's Attorney-Advisor, on Item No. 1 for the Special Meeting of February 22, 1979, re: Docket 18875, Phase III. It consists of staff recommendations.

13. Undated 11 page intra-office memorandum to Commissioner Fogarty from Lawrence Katz, Attorney-Advisor to the Commissioner, re: Trans-atlantic Communications Facilities/Planning agenda item, concerning, e.g., TAT-7, INTELSAT 5, and Docket 18875. It consists of a staff member's recommendations.

14. Undated four page intra-office memorandum to Commissioner Fogarty from Lawrence Katz, Attorney-Advisor to the Commissioner, re: "Trans-atlantic Communications Facilities/Comments on AT&T's August 31 filing." It consists of a staff member's analysis and evaluation of an AT&T pleading.

15. One page inter-office memorandum from Commissioner Fogarty to Chairman Ferris, dated October 5, 1978, re: DOD Briefing on National Defense Requirements for Additional International Cable Facilities. The memo contains recommendations on whether the Commission should have a national security briefing by the Department of Defense in association with Docket 18875, Transatlantic Facilities.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

AFFIDAVIT

I, H. Russell Frisby, Jr., being first duly sworn, hereby depose and say:

1. I am an attorney-advisor, Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission, Washington, D.C.
2. During September, 1979, I was asked by the Office of the Bureau Chief to prepare a memorandum on what issues I felt would be important to the European representatives at the upcoming Dublin, Ireland Conference. The Conference was ultimately held on October 2-3, 1979.
3. Pursuant to the above request, I prepared an undated background memorandum directed to James Smith, Esq., to assist those Commission representatives attending the conference in Dublin. The memorandum specifically dealt with CCI and International Television. It contained my thoughts on what information would be useful to the Commissioners in discussing the above two issues.
4. The last seven pages of this nine page memorandum were withheld by the Commission from ITT World Communications, Inc. pursuant to a request they made under the Freedom of Information Act. In the index attached to the Commission's Memorandum Opinion and Order in the matter, this memorandum in question was listed as item #7.
5. I believe the Commission properly withheld the last seven pages of the memorandum I wrote because that

portion contained matters I believed the individual Commissioners should consider in preparing to attend the Dublin Conference.

/s/ H. Russell Frisby, Jr.

[Dated APRIL 15, 1980]

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S  
FIRST SET OF INTERROGATORIES**

*Interrogatory No. 1*

This interrogatory pertains to the meeting between Commission representatives and representatives of foreign administrations and carriers which was held in Dublin during October 1979, in connection with a North Atlantic Planning Conference, and from which representatives of the United States carriers were absent.

(a) Identify all persons who were present at the meeting.

*ANSWER*

No master list of attendees at the subject meeting was made. Consequently, the following list is constructed from memory and may not be complete.

*Commission:*

Chairman Ferris  
Commissioner Lee  
Commissioner Fogarty

Mr. Robert Bruce  
Mr. Philip Verveer  
Mr. Eliot Maxwell  
Mr. Thomas Casey  
Mr. James Warwick  
Mr. Robert Gosse

*Department of State:*  
Mrs. Ruth Phillips

*National Telecommunications and  
Information Administration*

Lawrence O'Neill  
Edward Greenberg

*European and Canadian Telecommunications  
Representatives:*

Mr. Torsten Larsson, Sweden

Mr. James Hodgson, United Kingdom

Mr. G. Baggenstos, Switzerland

Mr. J. Crenier, France

Mr. J. Delorme, Canada

Mr. E. Brizzi, Italy

(b) State whether there was any mention or discussion at the meeting of the policies, preferences, or practices of (1) the Commission and/or (2) any foreign administration or carriers to provide any international communication service. Provide the following information with respect to each instance in which such subject(s) were mentioned or discussed:

- (i) Identify the person or persons who mentioned or discussed the subject.
- (ii) Fully describe the substance of the statements which each such person(s) made.
- (iii) Identify any person who responded to those statements, and fully describe the substance of his response.

*ANSWER:*

Defendant objects to these questions on the grounds that they solicit information which is irrelevant to this action. To the extent that plaintiff seeks relief under the Government in the Sunshine Act ("Sunshine Act"), 5 U.S.C. § 552b, plaintiff must establish that the Act applies to meetings attended by Commission members. In the list of attendees given in response to Interrogatory No. 1, defendant has identified the attendees; it is apparent from that list that there was no quorum of the Commission present, and the meeting therefore is not within the provisions of the Sunshine Act. Furthermore, to come within the provisions of the Sunshine Act, plaintiff must also establish that the meeting consisted of deliberations and determinations by the Commission of matters within the jurisdiction of the Commission. To the extent that plaintiff seeks to know what "mention" or "discussion" took place on various

topics at the meeting, the question does not go to deliberations by the Commission and is therefore irrelevant to this action.

(c) State whether there was any mention or discussion at the meeting of the desirability, or undesirability, of allowing new or additional carriers to provide any international communications service. Provide the information specified in Subparagraphs (i)-(iii) of Paragraph (b) above with respect to each instance in which such subject(s) were mentioned or discussed.

*ANSWER:*

Same as response to Interrogatory No. 1(b).

(d) State whether there was any mention or discussion at the meeting of the possibility that foreign administrations will, and/or should, take any action or adopt any official position or policy in consideration of, or in response to, any action or decision which the FCC may have taken at the foreign administration's behest or suggestion. Provide the information specified in Subparagraphs (i)-(iii) of Paragraph (b) above with respect to each instance in which such subject(s) were mentioned or discussed.

*ANSWER:*

Same as response to Interrogatory No. 1(b).

(e) State whether there was any mention or discussion at the meeting of any new carrier and/or the communications services offered, or proposed to be offered, by any of those carriers. Provide the information specified in subparagraphs (i)-(iii) of Paragraph (b) above with respect to each instance in which such subject(s) were mentioned or discussed.

*ANSWER:*

Same as response to Interrogatory No. 1(b).

(f) State whether there was any mention, discussion, or explanation at the meeting of any past or contemplated action or decision of the FCC. Provide the information specified in Subparagraph (i)-(iii) of Paragraph (b) above with respect to each instance in which such subject(s) were mentioned or discussed.

**ANSWER:**

Same as response to Interrogatories Nos. 1(b)-(e).

(g) Describe the substance of all remarks which were made by each person at the meeting, which are not fully described in response to Paragraphs (b)-(f) above.

**ANSWER:**

Same as responses to Interrogatories No. 1(b).

(h) State whether any document has been prepared which reflects in whole or in part, anything which transpired at the meeting.

**ANSWER:**

A compilation of notes was prepared.

(i)(a) Identify the person by whom the document was prepared.

**ANSWER:**

Robert E. Gosse

James C. Warwick

Thomas J. Casey

(i)(b) Identify each person to whom the document was circulated or shown.

**ANSWER:**

Defendant objects to this question on the ground that the fact of to whom a document reflecting what transpired at a meeting attended by Commission members was shown is irrelevant to plaintiff's claim that the Sunshine Act requires the Commission to hold open meetings when conferring with foreign telecommunications entities.

(iii) State the date on which the document was prepared.

**ANSWER:**

The week of October 10, 1979.

(iii) Describe the purpose for which the document was prepared.

**ANSWER:**

Defendant objects to this question on the ground that the reason the Commission or Commission staff prepared a document relating to discussions with foreign telecommunications entities is irrelevant to plaintiff's claim that the Com-

mission is required by the Sunshine Act to hold open meetings with foreign telecommunications entities.

Defendant also states that the document identified in response to Interrogatory No. 1(h)(i)(a) is listed as not available for inspection in Attachment II of the Commission's February 26, 1980 order which denied in part plaintiff's application for review of the Commission's previous partial denial of plaintiff's request under the Freedom of Information Act.

**INTERROGATORY NO. 2**

State whether any representative of the commission has held any other meeting with representatives of foreign administrations or carriers, at which the United States carriers were absent, and at which one or more of the subjects described in Paragraphs (b) through (f) of Interrogatory No. 1 were discussed. Provide the following information with respect to each such meeting, (including the meeting which is scheduled to occur in England on February 20-21, 1980):

(a) State the date and location of the meeting.

**ANSWER:**

(1) Ascot, near London, England on February 20-21, 1980.

(b) Provide the information specified in Paragraphs (a)-(h) of Interrogatory No. 1 above.

**ANSWER:**

(a) Persons who were present at the meeting:

*United States of America*

*Federal Communications Commission:*

Mr. C.D. Ferris

Mr. J.R. Fogarty

Ms. A. Jones

Mr. Philip Verveer

Mr. W. Demory

*Department of State*

Mr. A.L. Freeman

*National Telecommunications and*

*Information Administration*

Ms. V. Ahern

*Canada**Teleglobe, Canada:*

Mr. J.C. Delorme

Mr. A.G. Wallace

*CEPT:*

Mr. F. Thabard, France

Mr. H.P. Wirz, Germany (Fed. Rep. Of)

Mr. V. Ortoleva

Mr. G. Spasiano, Italy

Mr. B. Vree, Netherlands

Mr. F. Molina Negro, Spain

Mr. T. Larsson

Mr. B. Naslund (Secretary), Sweden

Mr. A. Hawkins, United Kingdom

(b)-(g) Defendants object to the questions contained in the paragraphs of Interrogatory No. 1 on the same grounds and for the same reasons as they were objected to in response to Interrogatory No. 1.

(h) State whether any document has been prepared which reflects in whole or in part, anything which transpired at the meeting.

*ANSWER:*

A document entitled "SUMMARY REPORT OF INFORMAL CEPT/NORTH AMERICAN DISCUSSIONS ON TRANSATLANTIC TELECOMMUNICATIONS—ASCOT, UNITED KINGDOM 20-21 FEBRUARY 1980" was prepared and agreed to during the meeting by the participants therein. The summary report was prepared to provide a record of the meeting. The report has been made available to plaintiff.

Ms. Veronica Ahern of the National Telecommunications and Information Administration prepared a memorandum entitled "Report of Informal Discussions, February 20-21, Ascot, England." The Commission objects to the release of this report because it is an intra-agency memorandum prepared for the use of the National Telecommunications and Information Administration.

(2) Common Carrier Bureau staff members have discussed among other things the topics of new international

carriers and services with representatives of the British Post Office. The meeting was held on February 7, 1980 at 1919 M Street, NW., Washington, D.C.

(a) Persons who were present at the meeting:

<i>Common Carrier Bureau</i>	<i>British Post Office</i>
<i>Participants</i>	<i>Participants</i>
Mr. Philip L. Verveer	Mr. Mike Morris
Mr. Willard L. Demory	Mr. Fred Dunn
Ms. Sue D. Blumenfeld	Mr. Bob Hinde

(b)-(g) Defendants object to the questions contained in the paragraphs of Interrogatory No. 1 on the same grounds and for the same reasons as they were objected to in response to Interrogatory No. 1.

(h) State whether any document has been prepared which reflects in whole or in part, anything transpired at the meeting.

*ANSWER:*

No such document was prepared.

*INTERROGATORY NO. 3*

State whether the Commission plans or contemplates holding any future meetings with representatives of foreign administrations or carriers. If any such meeting is planned or contemplated, provide the following information:

(a) State the date and place for which the meeting is planned;

(b) Identify the persons who have been, or will be, invited to the meeting;

(c) Describe each matter or subject which is expected to be discussed at the meeting; and

(d) Identify all documents which refer or relate to the planned meeting.

*ANSWER:*

The Commission does contemplate holding future meetings with representatives of foreign administrations or carriers at which the topics of new international carriers and services will be discussed. No dates for such future meetings have been set at this time nor has any determination been made of who shall attend future meetings. However, Commission representatives to the July 10-11, 1980 Senior

Level meeting of the North Atlantic Facilities Consultative Process will meet with representatives of the European and Canadian telecommunications entities in attendance to (1) decide whether a future meeting should be held to address new international carriers and services and other topics; and (2) if such meeting is to be held, to agree on a date and place for that meeting. While no definite arrangements for this procedural meeting have been made, the Commission contemplates that the meeting will be attended by representatives of the Commission, NTIA, the Department of State and of the European and Canadian telecommunications entities attending the Senior Level meeting. No decision has been made as to whether representatives of the U.S. carriers and Comsat attending the Senior Level meeting will be permitted to attend this procedural meeting. The Commission's representatives to the Senior Level meeting are expected to be: Chairman Ferris, Commissioner Lee, Commissioner Fogarty, Mr. Robert Bruce, Mr. Philip Verveer, Mr. Willard Demory and Mr. James Warwick.

#### *INTERROGATORY NO. 4*

Provide the following information with respect to (1) the Dublin meeting to which Interrogatory No. 1 refers, (2) the England meeting to which reference is made in Interrogatory No. 2, (3) any other meeting identified in response to Interrogatory No. 2, and (4) any future meeting identified in response to Interrogatory No. 3 between Commission representatives and representatives of the foreign administrations and carriers:

(a) State whether the Commission has decided or agreed to exclude representatives of the United States carriers from any or all such meetings.

(b) If the Commission has decided or agreed to exclude representatives of United States carriers from any meeting with foreign administrations or carriers, provide the following information with respect to each such decision or agreement:

(i) Identify the person or persons by whom the decision was made or with whom the agreement was reached.

(ii) State the reason or reasons for the decision or agreement.

(iii) Describe the notice and opportunity to comment which the Commission afforded interested parties in connection with its consideration of the possible exclusion of United States carriers from the meeting.

(iv) Describe the manner in which the decision or agreement was made to exclude representatives of the United States carriers from the meeting, and state the date on which the decision was made or agreement reached.

(v) State specifically (a) whether the Commission's General Counsel has certified, publicly or otherwise, that representatives of the United States carriers could be excluded from the meeting; (b) whether a majority of the Commission and/or its Telephone and Telegraph Committee have voted to exclude representatives of the United States carriers from the meeting (and if so, state whether the vote was recorded and the manner in which each Commission voted); and (c) whether a transcript, electronic recording, and/or minutes of the meeting were made and retained.

(vi) Identify all documents which refer or relate to the decision or agreement to exclude United States carriers from the meeting.

**ANSWER:**

1. (Dublin meeting) The Commission representatives to the Senior Level meeting of the North Atlantic and Facilities Consultative Process held in Dublin, Ireland on October 2-3, 1979 agreed to exclude representatives of the U.S. carriers and Comsat from the informal meeting with representatives of European and Canadian Telecommunications entities where the desirability of initiating consultations on the subjects of new international carrier and services and other topics was discussed.

2. (England meeting) With respect to the February 20-21, 1980 meeting in Ascot, United Kingdom, a Commission employee asked a representative of the British Post Office, the host of that meeting, whether representatives of the U.S. carriers, Comsat and other interested U.S. persons could attend the meeting. The representative of the

British Post Office indicated that there were insufficient accommodations for additional attendees.

3. Whether or not representatives of the U.S. carriers and Comsat will be permitted to attend such meetings in the future has not been decided at this time. Defendant objects to the questions in paragraphs (b)(i)-(v) of Interrogatory No. 4 on the grounds that how, by whom and for what reason representatives of telecommunications carriers were excluded from meetings with foreign telecommunications entities which were attended by Commission members is irrelevant to the issue of whether the meetings fall within the provisions of the Sunshine Act. It is clear from the list of attendees listed in answer to Interrogatory No. 1 that the meetings are not covered by the Act, and defendant was therefore not required to conduct the meetings, including decisions to exclude carriers from the meetings, according to the Sunshine Act.

#### **INTERROGATORY NO. 5**

State whether any Commission representatives have had any communication with any representative of a foreign administration or carrier, which is not fully described in response to Interrogatory Nos. 1, 2, and 3 above, during which one or more of the following subjects were mentioned or discussed:

- (a) The policies, preferences, or official positions of (i) the Commission or (ii) any foreign administration or carrier with respect to the authorization of new or additional carriers to provide any international communication service;
- (b) The desirability, or undesirability, of allowing new or additional carriers to provide any international communication service;
- (c) The possibility that foreign administrations will or should take any action or adopt any official position or policy in consideration of, or in response to, any action or decision which the FCC may have taken at the foreign administration's behest or suggestion;
- (d) Any new carrier and/or the communication services offered, or proposed to be offered, by any of these carriers; and/or

(e) The desirability of meetings between the Commission and foreign administrations or carriers to discuss one or more of the subjects specified in Paragraphs (a)-(d) above, and/or any actual or proposed meeting to discuss those subjects.

If there have been any such additional communications, provide the following information concerning each communication:

- (i) Describe fully the substance of each communication;
- (ii) Describe the manner in which the communication was made (*e.g.*, oral statement, letter, telex, or telephone call);
- (iii) Identify (a) the Commission representative and (b) the representative of the foreign administration or carrier who were parties to the communication;
- (iv) Identify all other persons who were present when the communication was made, or to whom the substance of the communication was communicated;
- (v) State the date, or approximate date, on which the communication occurred;
- (vi) Identify the location at which the communication was made; and
- (vii) Identify all documents which refer or relate to, or which constitute, the communication.

**ANSWER:**

Defendant objects to this Interrogatory on the ground that it is irrelevant to this action. To the extent that plaintiff seeks relief under the Sunshine Act, plaintiff would only be entitled to either attend meetings of the Commission which fall within the definition of meeting contained in the act, or, to the extent not authorized to be withheld, to have access to transcripts or minutes of meetings which were closed by the Commission pursuant to the Act. Plaintiff would not be entitled to information regarding any other discussions or conversations of Commission members or staff. Furthermore, conversations and discussions are not meetings within the definition of the act because they do not constitute deliberations of a collegial body.

**INTERROGATORY NO. 6**

State whether the Commission has adopted any formal or informal policy, rule or practice or procedure, and/or other

guidelines which pertain to (1) the manner in which Commission representatives can or should conduct themselves in meetings and/or communications with foreign carriers or administrations and/or (2) the subjects and matters which may, or may not, properly be discussed with foreign administrations or carriers.

(a) If such a policy, rule or guideline has been adopted, provide a citation to any published statement thereof in the *Code of Federal Regulations* and/or the *Federal Register*. In the event that there is no published statement in the *C.F.R.* or *Federal Register*, provide the following information with respect to each such policy, rule and/or guidelines.

- (i) State the substance of the policy, rule or guideline;
- (ii) Identify the person or persons by whom the policy, rule or guideline was adopted, and state the date of its adoption;
- (iii) Describe the procedure pursuant to which the policy, rule or guideline was adopted, including a description of any notice or opportunity to be heard which was afforded interested parties before the policy, rule or guideline was adopted.
- (iv) Identify all documents which refer or relate to, or which constitute, the policy, rule or guideline.

(b) Are there any restraints or restrictions on the discussions or communications of Commission representatives with foreign administrations or carriers which are not fully described in response to the preceding paragraph of this interrogatory? If so, identify and describe those restraints and/or restrictions.

**ANSWER:**

The Commission has not adopted any formal or informal policy, rule of practice or procedure or any guideline which pertains to the manner in which Commission representatives will conduct themselves in meetings with foreign carriers or administrations or the subjects which may be discussed with foreign administrations or carriers.

Plaintiff has filed a petition for rulemaking at the Federal Communications Commission. *Petition of ITT World Communications, Inc. for rulemaking concerning contacts be-*

*tween the FCC and foreign telecommunications administrations with respect to future international communication services and entry of new common carriers* (RM 3523). The Commission has adopted a memorandum opinion and order disposing of that petition. That order covers the issues raised in Interrogatory No. 6 and plaintiff will receive a copy of it soon.

#### **INTERROGATORY NO. 7**

State whether the Commission has adopted any formal or informal policy, rule of practice or procedure and/or other mechanism pursuant to which factual information communicated to Commission representatives by foreign administrations or carriers will or may be made part of the record in any administrative proceeding before the Commission to which such information may be relevant (including, without limitation, the Commission's consideration of any operating agreements which any new carrier may subsequently negotiate with any foreign administration).

(a) In the event that the Commission has adopted any such policy, rule or mechanism, provide the following information:

(i) Describe the manner in which the policy, rule or mechanism would operate, including, without limitation, an explanation of the opportunity which interested parties will have to investigate the veracity of the information in question and to discovery supplemental or contradictory information from foreign administrations or carriers.

(ii) Describe the manner in which the policy, rule or mechanism was adopted by the commission, state the date of its adoption, and identify the person or person who decided to adopt the policy, rule or mechanism.

(iii) Identify all documents which refer or relate to, or which constitute, the policy, rule or mechanism.

(b) Fully describe any other action, not described in response to the previous paragraph, which the Commission has or intends to take to prevent interested parties from being prejudiced in subsequent Commission proceedings by virtue of their exclusion from meetings or communications between Commission representatives and foreign administrations and carriers.

**ANSWER:**

Defendant has dealt with the matters raised in this interrogatory in its response to plaintiff's rulemaking petition discussed in the answer to Interrogatory No. 6.

**INTERROGATORY NO. 8**

State whether the Commission intends to do or attempt to do any of the following in the event that it meets or communicates in the future with foreign administrations or carriers:

- (a) Negotiate with the foreign administrations or carriers;
- (b) Narrow differences between the Commission and foreign administrations or carriers, and move toward consensus;
- (c) Discuss the services or capabilities of any particular United States carrier;
- (d) Ask foreign administrations (i) to enter into operating agreements with any particular carriers, and/or (ii) to adopt policies of permitting and/or encouraging new or additional carriers to provide international communication services; or
- (e) Assert or suggest that foreign administrations or carriers should take any action, or adopt any policy, because the FCC has taken any action which was purportedly requested or sought by those foreign administrations or carriers.

**ANSWER:**

The Commission does contemplate holding future meetings with representatives of foreign administrations or carriers at which the topics of new international carriers and services will be discussed. No date for such future meetings or the subjects which will be discussed has been set.

**INTERROGATORY NO. 9**

- (a) Fully describe the functions, duties, and/or responsibilities which the Commission has delegated and/or assigned to its Telephone and Telegraph Committee (i) generally and/or (ii) in connection with meetings or communications with foreign administrations and carriers.

(b) Identify all documents which set forth or describe, in whole or in part, the functions, duties and /or responsibilities of the Telephone and Telegraph Committee.

**ANSWER:**

The Commission's Rules and Regulations contain the following provision:

**§ 0.215 Telecommunications Committee.**

A telecommunications Committee, composed of three Commissioners, designated as such by the Commission, or a majority thereof, will act, except as otherwise ordered by the Commission, upon all applications or requests (except requests for special temporary authorization covered by § 0.291) submitted under Sections 214 or 319 of the Communications Act of 1934, as amended, by communications common carriers, where the estimated cost of construction (or value or radio facilities where an assignment or transfer of facilities is involved) is in excess of \$10 million.

**INTERROGATORY NO. 10**

State whether the Department of State has authorized the Commission to negotiate with foreign governments in connection with any of the subjects described in Paragraphs (a)-(e) of Interrogatory No. 5. If the Commission has received such authorization, provide the following information:

- (a) Describe the nature and extent of that authorization.
- (b) State the date on which the authorization was received, and identify the agency and/or official who granted the authorization.
- (c) Identify all documents which refer or relate to, or which constitute, the authorization.

**ANSWER:**

No such authorization has been received from the Department of State since none is necessary for the meetings the Commission has participated in.

The Commission's participation in the consultative process (to which the Department of State has never objected) is authorized by 47 U.S.C. § 151.

**INTERROGATORY NO. 11**

Identify separately for each response to the foregoing Interrogatories (a) each person consulted in preparing the response; (b) each other person known to the Commission who would have knowledge of the information which is the subject of the interrogatory (including, without limitation, persons not employed by or affiliated with the Commission) and (c) each document consulted in preparing the response.

**ANSWER:**

- (a) #1 Robert E. Gosse
- #2 Robert E. Gosse  
        Willard Demory
- #3 Same
- #4 Same
- #5 Not applicable
- #6 John P. Greenspan
- #7 John P. Greenspan
- #8 Not applicable
- #9 John P. Greenspan
- #10 Keith H. Fagan  
        John P. Greenspan

(b) Each attendee listed in response to Interrogatories 1 and 2 would presumably also have knowledge of information provided in response to the Interrogatories, although the extent and scope of their knowledge is not known by defendant.

(c) The only documents consulted in the preparation of responses to the interrogatories have been identified in response to the respective interrogatories to which they pertain.

The foregoing answers to these interrogatories are, to the best of my knowledge and belief, true and correct.

/s/ Willard J. Demory

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Assistant Chief, International Common Carrier Bureau  
Federal Communications Commission

Date: MAY 9, 1980

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS INC., PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

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AFFIDAVIT IN SUPPORT OF PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT

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STATE OF NEW YORK

: ss.:

COUNTY OF NEW YORK

GRANT S. LEWIS, being duly sworn, deposes and says:

1. I am a member of the firm of LeBoeuf, Lamb, Leiby & MacRae, attorneys for plaintiff, ITT World Communications Inc. ("ITT Worldeom"), in this action. I submit this affidavit in support of ITT Worldcom's motion for summary judgment on its second and third claims for relief.

2. Plaintiff's second claim for relief relates to an October 12, 1979 Freedom of Information Act ("FOIA") request that was sent to the FCC. That request has not previously been filed with this Court. A true copy of the October 12 request is attached hereto as Exhibit A.

3. On April 14, 1980, in response to another FOIA request, the National Telecommunications Information and Administration of the U.S. Department of Commerce ("NTIA") released a report of the discussions held during a meeting in Ascot, England, on February 20-21, 1980 from which ITT Worldcom and other American carriers were excluded. A true copy of the NTIA report is attached hereto as Exhibit B.

4. On February 8, 1980, ITT Worldcom representatives attended a meeting of the FCC, openly recorded the meeting, and caused a transcript to be made. A true copy of the transcript is attached hereto as Exhibit C.

5. On April 22, 1980, ITT Worldcom representatives attended a meeting of the FCC, openly recorded the meeting, and caused a transcript to be made. A copy of the transcript is attached hereto as Exhibit D.

/s/ Grant S. Lewis

Dated: New York, New York  
JULY 25, 1980.

[EXHIBIT A]

[reprinted at J.A. 20-21, *supra*]

## [EXHIBIT B]

## UNITED STATES DEPARTMENT OF COMMERCE

National Telecommunications and

Information Administration

Washington, D.C. 20230

MARCH 24, 1980

MEMORANDUM FOR: The Files

From: R. Ahern

Subject: Report of Informal Discussions,  
February 20-21, 1980. Ascot,  
England

On February 20th and 21st, I attended a meeting held in Ascot, England under the sponsorship of the CEPT for the purpose of discussing trans-Atlantic telecommunications. A list of participants at the meeting is attached.

The meeting came about after a series of telexes and other communications were exchanged between Chairman Ferris of the FCC and Chairman Larsson of the CLTA in the fall of 1979 and in the beginning of 1980. These communications were prompted by a request made by Chairman Ferris at the meeting held in Dublin in October 1979. At that meeting, Chairman Ferris sought and was granted a private meeting between the FCC and other U.S. Governmental agencies and Canada and CEPT for the purpose of discussing the introduction of new carriers and new services in the North Atlantic corridor. At that meeting, as at this Ascot meeting, no U.S. private communications carriers were present.

The summary record of the Ascot meeting, as it was finally adopted, is attached to this memo. The purpose of this memo is to describe in considerably more detail than is reflected in the summary record the events of the meeting.

The meeting began at 9:45 a.m. on February 20th. The representative of the BPO, Mr. Anthony Hawkins, welcomed us on behalf of the host administration. Chairman Larsson, the Chairman of CLTA and the Chairman of the meeting, then proceeded to add his welcome and to set forth what he considered to be the terms of reference for the meeting. He said first that the idea for these

discussions came from Chairman Ferris in Dublin. After that meeting, representatives raised the issue in the T Committee (which I believe is the Technical Committee) meeting of CEPT in November. The T Committee decided that additional information would be valuable and therefore Chairman Larsson agreed to this informal meeting. Chairman Larsson said that the idea behind the meeting is to have as much information as possible about areas of mutual interest. He emphasized that it was not within the terms of the meeting to make recommendations, take decisions or to change the situation. CEPT makes recommendations; however, administrations take decisions.

Chairman Larsson then went on to say that CEPT countries are interested in broad discussions of items of mutual interest, but standardization is very important. They do not consider that they have been very successful in the pulse code modulation (PCM) area. They believe that some coordination of standardization efforts would be in the best interests of all the world. For this reason, viewpoints on issues relating to standardization should be expressed. Therefore, there will be three main points discussed at the meeting: standardization, new services, and new carriers.

Chairman Ferris of the FCC then took the floor, expressed his thanks, and delivered an opening statement, the text of which is reproduced in the summary record.

Mr. Freeman of the State Department was asked to address the question of standardization. He very briefly identified four areas of concern for the United States and indicated that we were interested in strengthening our mutual efforts within the CCITT.

At this point, Chairman Delorme of Teleglobe Canada expressed his thanks to the BPO for arranging the meeting and, in a very short opening statement, indicated that Teleglobe Canada considered itself more in the nature of an observer than as a full participant in this meeting because the issues seemed primarily to relate to U.S.-CEPT relationships. Chairman Delorme nevertheless indicated Teleglobe Canada's great interest in the subject matter. He cautioned the group to take care because progress in this area will not occur overnight, and because the basic struc-

ture, as well as basic services, of international telecommunications must be protected. The intervention of Chairman Delorme signaled the coffee break.

The meeting resumed at 11 o'clock and the first item on the agenda became the question of harmonization. Monsieur Thabard of France began the discussion by saying that, from a European viewpoint, there is considerable concern about the issues relating to standardization and harmonization. Discussion of those issues is not intended to subvert the ITU or CEPT. Nevertheless, discussion is important because the issues are not only a matter of connecting networks but a matter as well of compatibility between customers. The situation has changed so that the danger now is of closed groups of users adopting standards and lessening competition. Mr. Ortoleva of Italy then took the floor on behalf of Mr. Gualardi, who is the Chairman of the Coordinating Committee within CEPT on standardization. He undertook to review the relationships between the United States and CEPT on this issue beginning in 1976 and concentrating on an exchange of correspondence held in that time frame with John O'Neill. It was clear that there was disappointment with the failure of the United States to follow through on Mr. O'Neill's initiatives concerning consultations on standardization issues. Mr. Ortoleva indicated that the CCH will meet at the CEPT plenary meeting in March, and that after March it may be useful to have a further meeting, at which time we could draw up a list of matters of mutual interest and continue discussions.

Chairman Larsson then sought the guidance of the meeting on whether the further meeting on standardization issues will be worthwhile. Mr. Freeman of the State Department indicated that he was aware of meetings taking place in 1976 between Mr. O'Neill and others and that it was true that some interest was expressed in having further meetings. But it is difficult within the United States to coordinate this subject because of the various diverse interests, not only within Government but also among carriers, manufacturers, users, etc. "We do not feel," said Mr. Freeman, "that there is a sufficiently focused U.S. position. However, if subsequent to March, CEPT were to furnish us

with specific topics for consultation, we would certainly consider the utility of further meetings." Chairman Ferris offered to provide FCC mechanisms for a formal proceeding with the Office of Chief Scientist.

In response to Mr. Freeman's suggestion that it would be valuable to compile a further list of topics for discussion, Mr. Ortoleva replied that there was not very much new. A clear notion of items for discussion comes from the existing list. Mr. Hawkins commented on Chairman Ferris' statement by saying that perhaps the ITU is the appropriate forum. He asked whether we could agree that standards for the Atlantic region are likely to give a lead for wider worlds and, perhaps if agreement could be reached between such countries and the United States, those agreements would form the lead for the ITU. Mr. Hawkins also remarked that, with regard to harmonization, there were difficulties because of the multiplicity of IRC's. Chairman Larsson indicated that we should have some current review of standardization and that the summary record should indicate agreement to do efficient work on this matter.

At 11:35 a.m., the second item on the agenda, that is a discussion of new services, was raised. Chairman Larsson introduced the topic by making clear that everyone in the room was interested in new services, principally because of market demand. In most cases, new services are introduced first in the United States, but not always. The United States should be interested in exchanging information, particularly on text communication services which have been introduced first in Europe. Chairman Larsson also stated that it was not generally economical to interconnect with a new carrier to initiate a new service, because of network planning. The principle is to use the existing networks. Chairman Larsson also stated that, as a rule, CEPT was not against new carriers. In fact, when it is economical, he said, they will introduce operations. Further they will introduce new services when there is demand, but almost always will use existing networks. Chairman Larsson, with apologies for going from the generalities to the specifics, described the situation with regard to Tymnet and Telenet. He said there is a demand for packet-switched services that

he sees, and, in fact, in Sweden they have bought a switch from a U.S. company. They have agreements with the IRC's to reach Tymnet and Telenet. It is not, however, economical to have a separate switch and have direct operations with either Tymnet or Telenet. It is economical to use the existing carriers. However, if traffic rose, direct circuits may be economical, but they are clearly not at this time.

Chairman Ferris intervened to say that he thought Chairman Larsson's remarks were helpful from the standpoint of making a distinction between new services and new carriers. He admitted that in the United States we tolerate a more Darwinian approach to carriers. He said that we are here to listen and learn what problems our policies present to the Europeans, and what factors of distribution there are. He spoke further about protecting the economic infrastructure, but within that need he saw the possibility to accommodate new services, utilizing more fully the existing infrastructure. He asked the Europeans if his view is correct. Chairman Larsson indicated that it was difficult to understand what was meant by new services. Does this mean certain very important customers use only a specific service, or is it special procedures, special data banks, special terminals, etc.?

At this point, Mr. Spasiano of Italy intervened, with what he said was the clear position of the Italian administration. In Italy, there are basically two kinds of services. The first are social services. The second are special business services. He said specifically that the Italian Administration is against resale of circuits because it is detrimental to their social service offerings. He further indicated that the Italian Administration participates in CEPT and CCITT. They give special priority to the United States because new services are born there. However, they want to continue discussions within the CEPT and CCITT frameworks. They are reluctant to transfer discussions to other forums when those discussions do not include the correspondents with which new services will have to be introduced. Mr. Spasiano concluded by emphasizing that he was speaking specifically on behalf of the Italian administration,

but that he was certain that other countries shared his views.

Mr. Thabard of France spoke in support of the statements made by Mr. Spasiano. He said France will encourage new services, but that does not imply new carriers when those carriers do not contribute anything new or when those carriers simply reuse circuits. He alluded to cream skimming and expressed concern about raising the costs of their social services. He said it was irresponsible of the French Administration to neglect their public responsibilities. He was specifically opposed to resale. He further cited a specific example, that they were not prepared to introduce direct packet-switching unless it could be found that there was some economic advantage.

Mr. Molina Negro of Spain said that he shared some of Chairman Ferris' ideas, but he also shared European views as well. He stressed the difficulties in Spain that would arise from increasing the number of carriers. When new carriers fail to offer new services, they wind up asking the Spanish administration to use old services at a higher rate. He stressed that we should be extremely careful about new carriers, in that they do not offer new services.

Mr. Wirz of Germany supported his colleagues statements and indicated that they have the same problem in Germany. He alluded to the cream skimming issue.

Mr. Hawkins of the BPO indicated that the BPO's postures on balancing social services and business services might be slightly different from other European administrations. However, the critical question was whether the introduction of new services means new costs and are those costs justified? He asked if Chairman Ferris could be more specific, since general statements were not adding very much.

Chairman Ferris said that the European statements had been very useful to him. He also commented on the issue of mandatory interconnection, since mandatory interconnection and unbundling will reduce the concerns regarding the introduction of new carriers and will enhance the competitive environment. He said that it was clear there is a definitional problem relating to a merger of carriers and services.

The problem of internal subsidies is not unique to Europe; it exists within the United States too.

We are moving to cost justification of each service, thereby making conscious judgments on the flow of subsidies. Chairman Ferris then said that if there was no dedication of specific facilities, costs are not changed. Therefore, this should not present a problem regarding internal subsidies. It presents no particular disruption of revenue flows. To require specific facilities, he understands, can affect particular revenue flows.

Chairman Ferris then mentioned the current challenge to the Authorized User Decisions and indicated that the issues surrounding COMSAT becoming a direct retail provider might have some effect upon internal subsidies. This is separate, however, said Chairman Ferris, from "value-added services" where no subsidies would occur. He asked whether his understanding was correct.

Chairman Larsson, in a very general statement, said that communications regarding value-added services would be valuable.

Mr. Hawkins of the BPO quickly intervened, saying that he was concerned that Chairman Ferris did not understand the position of the Europeans. He said new facilities are not just hanging around. It costs money to bring new circuits into use. It certainly costs extra for a service that may not be needed. He did not, therefore, accept Chairman Ferris' view of the issues.

Chairman Ferris indicated that he was attempting to segregate issues. He understood the necessity of cost benefit analyses, but wanted to know whether there was anything beyond those analyses which was required prior to the introduction of new services or carriers. Chairman Larsson said he understood a value-added carrier to be one that has a connection to a separate network, but that uses the existing network. He further said that if it is a good service, they were clearly interested.

Mr. Hawkins again intervened, saying that at the BPO they look to considerations of demand; specifically, could they be satisfied that they would not be using a failing service, not only in revenue terms but also in technical

terms? He raised the question of unemployment, and indicated that particular to the BPO is great concern over union problems.

Mr. Spasiano intervened to confirm his first statement that he is in favor of new services. However, in order to fully understand what new services are being contemplated and how, he needs examples. The distinction being made between value-added carriers and services and resale carriers and services were not clear. He gave two examples. In the first, someone leases the AVD from a carrier, establishes an Italian office, and "cuts that service in slices and gives it to others." The Italian Administration considers this third party use and does not accept it. The second example which he used related to a specific carrier, CCI. Someone uses the MTS network and makes a redistribution of normal telex messages. He does not accept this use either. He asked Chairman Ferris specifically to comment on which of the two examples he gave would be considered resale and which would be considered value-added.

Chairman Ferris said that, in his opinion, the second example is resale, the first is value-added. He then changed the topic to the recent authorization by the FCC to COMSAT for the provision of direct television service and asked "How does that decision sit with you?"

Mr. Hawkins indicated that examples regarding satellites would be developed after lunch. Mr. Delorme intervened to say that it was clear to him that it was necessary that we arrive at some form of common definition of what we mean by resale and value-added. The meeting then broke for lunch.

When the meeting resumed, Chairman Larsson gave the floor to Tony Hawkins of the BPO.

Mr. Hawkins, using the example of COMSAT's authorization for television service, described what the changes in the Authorized User Decision would mean for the BPO. He understood that the effect of bringing COMSAT into the marketplace would be to abolish rotational arrangements. The new arrangements may be more complicated. Broadcasters would come to the BPO. The BPO would have an uncertain understanding of with which carriers they should

deal. He said that there could be problems for the BPO in this regard, but indicated that he did not consider them to be particularly serious. In fact, the customer must learn to do more for himself in this case. The principle, said Mr. Hawkins, is that the FCC, of course, has the right to allow COMSAT to offer this service, but that each administration has the right not to be a correspondent. He said that, in the case of COMSAT, since it was a well known international telecommunications entity, there would probably be no problem. But in other cases, stability, that is the stability of the carrier at issue, might be a problem. There will be, of course, extra work relating to a settlements and operational agreement with COMSAT. That can be arranged. In sum, said Mr. Hawkins, we must retain our right to choose our correspondents based upon economic considerations, operational considerations, and the flow-throughs which we may get.

Chairman Ferris said that his understanding of Mr. Hawkins' intervention was that the sentiment regarding COMSAT is that "COMSAT passes the litmus test." Ferris asked whether the assessment is regarding the carrier and not the service? Mr. Hawkins indicated that Ferris' question widens the issue. He was not intending to say anything more than that COMSAT is a stable organization likely to exchange accounts regularly. Ferris indicated his question was regarding the concern of the BPO, that is, do they care about the overall network arrangements or only their own? Mr. Hawkins replied that the BPO is concerned both with revenue and customer satisfaction. Ferris asked whether the BPO goes behind a carrier's representations regarding quality of service. Mr. Hawkins then said that he did not want to be too specific, but if one of the four existing IRC's dropped out, the BPO would be delighted because the quality of service provided by that carrier was not sufficient. Chairman Ferris asked what factors exist to prevent the BPO's dropping that carrier. Mr. Hawkins indicated that, of course, their rotational arrangement had made that an impossibility. Chairman Ferris then spoke about mandatory interconnection and unbundling in what appeared to me

to be an irrelevant comment with regard to television service, although at this point the discussion was very confused.

Mr. Fogarty raised the overall issue of Authorized User and indicated that he expected that in April the Commission would revisit the issue and asked what ramifications would follow. Chairman Larsson asked what would be expected to happen when the Commission revisited the issue, what differences would there be. Chairman Ferris said that he did not know. He said the IRC's are offering services that are more than simply the overseas link, and that the intention would be to allow customers to make choices in their ways of approaching the problem. Mr. Fogarty intervened to say that if the Commission approves Authorized User, his belief is that the price of the overseas link will be driven close to cost. Service offerings to the customers will improve. The IRC's will each offer enhanced services.

Mr. Hawkins asked what services a revision in the Authorized User would encompass. Mr. Ferris answered leased services. Chairman Larsson was concerned that if the area was free for competition, carriers could presumably book more time than is possible to transmit. Chairman Ferris said that some coordination should exist.

Mr. Spasiano then intervened to make a general statement about new carriers. He indicated that ITALCABLE was the first correspondent in Europe to open service with TRT. He said that this opening of service with a new carrier is not a habit, but when they see it as an advantage, they do it. It is not a compulsory action; it is judged on a case-by-case basis. He then said that if the Commission's decision with regard to mandatory interconnection means that it is possible to connect with only one carrier and get all customers, the picture will change entirely. Chairman Ferris intervened at this point to indicate once again that he was not talking specifics.

Mr. Thabard of France asked whether the conversation might be getting unnecessarily obscure and brought the discussion back to T.V. He said that in the case of T.V. service, the problem with regard to COMSAT is very different than with other carriers. There is no problem if COMSAT is the only entity. He had, however, some reser-

vations when the discussion goes beyond television service. Planning becomes a problem. If COMSAT were allowed to offer services directly, there would be a distortion between cables and satellites. He said that there are, of course, merits to competition, but there are services where no competition exists. While they accept the U.S. position on competition, the U.S. must also realize that the Europeans are free to choose.

Chairman Ferris indicated that the concerns of Mr. Thabard were valid and that it was not beyond the realm of possibility that COMSAT might be permitted to buy cable circuits. Chairman Larsson closed the meeting for a coffee break by saying that COMSAT is certainly a special case and not particularly one that need be discussed at great length.

After the coffee break, Chairman Ferris tabled definitions of resale and value-added. Those definitions are included in the summary record.

Mr. Hawkins asked for specific examples. What role, for example, does the FCC see for CCI?

Mr. Verveer intervened to answer Mr. Hawkins' question. He indicated that the Commissioners would not address specific cases or carriers. He answered the question by saying that the Commission believes CCI falls into a "pure resale category," and that CCI perhaps should not fall into classical public utility regulation. The Commission, said Mr. Verveer, has committed itself to a study of the question of international resale.

Mr. Thabard indicated that the definitions submitted were useful, but they may twist words beyond meaning. For example, a value-added carrier may well exist in telephone services.

Mr. Spasiano intervened to ask whether it was possible to use Telenet as an example. Is Telenet a resale or a value-added carrier? Is it, in fact, a carrier?

Mr. Verveer said that, in his view, Telenet, Tymnet and Graphnet are all common carriers, and that the Commission thought of all three as value-added carriers. Mr. Verveer then drew the distinction between a conventional facilities-based common carrier, for example SBS or XTEN, and a

value-added carrier. He said that value-added comes into play when no ownership of facilities occurs.

Mr. Spasiano asked what the distinction was between carriers who must file a tariff and those who do not. Mr. Verveer replied that the reference was to the concept of sharing, that is communications users who act in bulk. He described the decisions relating from the domestic resale decision, which determined that a resale carrier would file a tariff, a sharer would not be required to be regulated.

Mr. Thabard asked whether his understanding was correct that whenever a carrier has access to the public, it's a common carrier. Then he asked what is the situation of a time-sharing company which offers other than data processing services.

Mr. Verveer said that the United States does have private carriers, generally private microwave facilities. Regarding the time-sharing issue, that involves the second computer inquiry and the FCC now has that under consideration.

Mr. Spasiano asked whether General Electric would be considered a common carrier, or in his words a "transmission carrier," and asked whether they have a tariff. Mr. Verveer replied that General Electric is not required to file a tariff.

Chairman Larsson asked whether General Electric operates with special circuits. Mr. Vree from The Netherlands replied that, in the case of The Netherlands, General Electric has 50 kilobit private line circuits.

Chairman Larsson described in general that the test which the European administrations used went primarily to economic benefits. When it is economical, they will introduce direct circuits with the carrier. But until there is sufficient traffic, it will not be economical.

Chairman Ferris said that each country will likely have its own test. Mr. Thabard said that Chairman Ferris was right. Mr. Thabard further said that while each nation is sovereign, and each nation will, of course, have its own test, the function of CEPT is consultation within the European community, and that Chairman Ferris should not feel

that the Europeans are not united. In fact, they are a united front.

Chairman Ferris replied that the Commission's intention was to join the united front, at least in terms of consultations.

Mr. Spasiano tabled a document showing circuit distribution within Europe. There were several interventions during which that document was corrected.

Chairman Larsson then asked the question whether it could be agreed that the general proposition that new carriers will be introduced when the economic situation warrants was acceptable. Mr. Thabard intervened to say that he thought it should be rephrased to include a double negative, that is, new carriers will not be introduced unless there is an economic reason to do so.

Chairman Ferris intervened to say, "Yes, but my understanding is that each country will face that decision on its own terms."

Chairman Larsson said that there was general acceptance of the Commission's interconnection decision, since they believe it would make it easier to introduce new services.

Mr. Spasiano said that, from his viewpoint, the best solution to the problem was to have only one correspondent. He added that they are obviously open minded and they talk to all carriers.

At this point, Chairman Delorme of Teleglobe intervened to seek clarification. He reviewed what he considered to be the two basic premises underlying the FCC's motivations. First, he said, is that the general objective is to encourage development of new services. The FCC has determined that the best way to do this is to liberalize conditions, that is to open the market up to competition. The second premise is, that due to the monopolistic characteristic of basic service, the regulatory agency tries to act like the marketplace. His point, he said, was to ask two questions. If there is a proliferation of carriers, the role of the FCC will presumably change. How will this take place? Secondly, under certain circumstances value-added carriers may provide service similar to common carriers, but at a lower

rate. The operating cost may be only one factor to be considered. The accounting rate is another one. What happens when a carrier negotiates a lower accounting rate with a monopolistic foreign correspondent? Can this happen?

Chairman Ferris responded to Mr. Delorme's questions. He said first that this issue goes to the heart of the basic FCC philosophy. Then he spent several minutes redescribing in very general terms that philosophy. When he returned to specifics, he admitted that he did not know what the mechanism is for the accounting rate, and therefore had some difficulty understanding the drift of Mr. Delorme's question.

Delorme then took the floor again and, without directly using the word "whipsawing," described a situation in which a value-added carrier, since it was presumably unregulated, would have greater freedom than a common carrier in negotiating accounting rates.

Chairman Ferris then replied that might happen, but he thought that the FCC would in some way retain jurisdiction over the question.

Mr. Spasiano and Mr. Mathews of Canada tried to clear up the question by reminding us that it depended to some extent upon the flows of the traffic between the two individual points as to who would win and who would lose. Ferris then responded that it had never been a problem that he was aware of, that it seemed a bit like a mosquito climbing up the leg of an elephant. Mr. Delorme ended the day by pointing out that in Canada they grew their elephants very small and their mosquitos very big, and therefore he remained concerned.

At 9:30 a.m. on February 21st, the meeting resumed for the purpose of agreeing upon summary records. Several drafts were proposed. Various wording changes were suggested. Finally, at approximately 11:30 a.m., agreement was reached on a summary record which is included as an attachment to this memo.

Chairman Larsson then raised the question of whether a future meeting of this group would be advantageous. Chairman Ferris indicated that he thought we all agreed upon the usefulness of this meeting, and he believed that a fu-

ture meeting would also be helpful. Perhaps, he said, we would continue after the July meeting sometime in the next year. Chairman Larsson indicated that he will report to the T-Committee that he believes that this meeting should not be combined with the facilities planning meetings or any other meeting, since the administrations might seek to send different people. It would be possible, if we wish to have another meeting, to set the date when we meet in July. The meeting adjourned at approximately 12 o'clock.

Attachment

H. Geller  
E. Zimmerman  
I. A. Staff  
W. L. Fishman  
F. Chisman  
G. Skall  
D. O'Neill

## [EXHIBIT C]

## [Transcript of February 8, 1980, FCC meeting]

Ferris: Communications Satellite Corporation, ITT World Communications Inc., AT&T, RCA Global, etc.

Applications for Authority to Provide Satellite Television Services Directly to Users at U.S. Earth Stations

To End the Rotational Arrangements for Overseas Television Service

Verveer: Mr. Chairman, Jane Mago will present this item. I'd like to note at the outset two editorial changes in it. The first is we would propose after consultations with the General Counsel's office to essentially delete the bulk of the discussion paragraphs 13-18 of the first of the attached items to make it quite clear that we are not resolving what should be regarded as tariff issues in a 214 application setting. The second editorial change was suggested by Commissioner Jones. It is in the second item at paragraph 13 having to do with verification of the interpretation of Section 222 of the Act. Commissioner Jones correctly pointed out that it's unnecessary for us to reach or to characterize that section. We would propose deleting the phrase that does characterize the Commission's present view of 222.

Lee: Before your explanation it might help you if I told you my problem. Seems to me we need to discuss one aspect of items 4 and 7 jointly, 7 being the Graphnet proposal. We hold in paragraphs 27 and 28 of item 4 that it is alright to allow Comsat to provide service without having its authorization conditioned on obtaining operating agreements, but in item 7 we continue to require that Graphnet obtain such operating agreements as a condition of its authorization as concerned with the-looks like-different method of treatment in the two items so you can address that issue.

Verveer: Commissioner I'll try to answer that right now. The item No. 7 involving Graphnet is essentially a follow-on to Commission action that has occurred some considerable time ago with an intervening judicial decision essentially instructing the Commission to put some sort of a time limit on the authorization that had been granted to

Graphnet. We have spent some time in the Bureau reflecting upon the nature of operating agreements and the requirement and whether or not this Commission should in each and every or perhaps in any circumstance require U.S. carriers to obtain operating agreements as a condition of authorization for service. And while we haven't come to any firm conclusion we could recommend to the Commission I think that Item 4, which does not make the obtaining of operating agreements a precondition, probably more closely reflects our view of what would be appropriate Commission policy than does the Graphnet Item No. 7 which as I say is essentially now a follow-on to something that had been set in motion some considerable time ago.

Lee: Was it your opinion that Items 4 and 7 are consistent in the treatment occasioned by the Court intervention?

Verveer: Yes. Commissioner, I think at this point I wouldn't want to say that there has in fact been a change of policy, because we try to point out in Item No. 4 there have been instances in the past in the Atlantic Ocean region where no operating agreements were required, essentially because its a blanket authorization one cannot really contemplate, one wouldn't want to contemplate requiring the carriers to obtain operating agreements with each and every entity, each and every country with which they may want to do an international television transmission business. And so what we are proposing here is quite consistent with something the Commission did eleven years ago. I believe it was eleven years ago in the Atlantic Ocean region; but, referring to the Graphnet situation I wouldn't want to say, I wouldn't want to be in a position . . . I'll back up and I'll start that sentence again. Were we writing on a completely clean slate with respect to the Graphnet application for international authorization, I am not sure today, Commissioner, that the Bureau would recommend to the Commission that it condition Graphnet's authorization on the obtaining of an operating agreement with one or any foreign entities.

Ferris: Was the purpose of that condition, Phil, to protect against potential marketing arrangement when you really didn't have the capacity without the landing rights al-

ready obtained and therefore we had to protect the potential users against a premature marketing of that service?

Verveer: I think, and we are trying to begin to discover the historical origins of these requirements for operating agreements, but I think that the Commission's interest in operating agreements stems more from a concern about settlement rates with foreign entities. That there is a bit of a fear because we have multiple carriers offering an international business and in general the foreign administrations have only a single carrier offering an international business. That our carriers would in essence bid up the price of settlements. That is our carriers would agree to less favorable settlement rates as they sought to conclude operating agreements with foreign administrations and that there be cash outflows; there would essentially be dollar outflows from the United States because our carriers would be retaining less than a 50% share, let us say, of the total monies that were being paid in for telecommunications services. I think that that is surely one of the reasons the Commission first became involved in this. Now it may not be the only reason. I have some suspicion in looking at this point not as deeply as I would like to, however, that the whole concept of operating agreements is one in which there has been an enormous gloss put through the years; that various entities in arguing against their competitors' offering of service have made of the obtaining of operating agreements more than maybe the Commission really would like them to be.

Lee: I guess the bottom line is, can Graphnet provide service without an operating agreement. Are they providing service now?

Mago: Commissioner we might point out that in the Graphnet decision the Court itself said that we should require an operating agreement because they felt that in that situation the service might not be available to the public if we allowed Graphnet to have an unconditional authorization. That at some point they would be preventing other carriers from offering that service to the public.

Lee: CCI has been operating without.

Verveer: Yes, Commissioner I think that may be really one of the keys as the technology is changing as the international communications environment is changing. It's quite clear that in some basic sense, in order to offer international service or to offer any kind of a communications service, one has to have some sort of operating agreement, some sort of an operating arrangement with someone at the other end of the circuitry, and where transmission facilities are owned, it's fairly clear that one has to interconnect with other kinds of transmission facilities or someone to carry on the traffic further on. But where we're talking about a resale business of the sort that CCI offers, it's not really at all clear that an operating agreement of the same nature as between AT&T, for instance in a foreign entity, is going to be required. In fact, on the contrary, it's quite clear that we really are beginning to deal with something quite different; and if we were to continue to require operating agreements for all entities, and in particular resale kinds of entities, that don't own underlying transmission facilities, we might in fact be making it possible by our own processes, our own legal requirements, we might be making it much more convenient for entities, wherever and whoever they may be, who are opposed to the idea of additional services or additional carriers to prevent the offering of service essentially by operation of communication regulation. The CCI situation I think is an excellent example. These folks were offering some sort of a service, apparently successfully, without any operating agreement in quite the same sense as an operating agreement between different telecommunications entities. And so, as I said, the Bureau is trying at this point to rethink the whole concept of operating agreements, and particularly to rethink whether or not it continues to be in the interest of the U.S. ratepayer for us to condition all of the international authorizations upon the obtaining of operating agreements. And, in fact, as we indicate in Item 4, there have been instances in the past in international television transmission, for instance, in the Atlantic Ocean region, where the Commission did not require operating agreements.

Ferris: Well we've screwed up your presentation far enough now. Why don't you go ahead and pick up?

Mago: The items before you are intended to implement the policy which the Commission adopted in Spanish International Network. There we said that the public interest would be served by allowing competition for international television services. In addition, we found that Comsat should be allowed to be a competitor in that market. Therefore, the first item before you, I-P-C-50, implements the authorization to Comsat. In that item, we give Comsat full authority to serve television customers directly. There was a good deal of discussion in that order about Comsat's proposed tariff which proposes to offer the service at the same rate to the customers as it does to the carriers. As Phil discussed earlier, we will defer for due process reasons, the final decision of that cost justifiability. The carriers also argued, however, that we have to consider that in terms of the competitive impact that it would have on the international television market. We have determined that any of the possible competitive impacts which may result as a part of our authorizing Comsat's direct service are likely to serve the public interest and therefore do not act as a bar to the grant of this authorization. In addition, in response to Commissioner Lee's point, we found that there is no need to have Comsat file operating agreements prior to the grant of this authorization, in that there is no question that Comsat will be able to offer this service, and there is no question that it would be barred to the public. Finally we've decided to . . .

Ferris: Why is it no question?

Mago: Because Comsat has been offering the service for some fourteen years through the carriers. Comsat in addition has operating relationships with foreign entities that they would be operating with here.

Ferris: Would Comsat be making the arrangements with the foreign countries with respect to the terrestrial length or would that be done . . .?

Mago: They may be doing that.

Ferris: They might be doing the arrangements for the terrestrial length?

Mago: Yes they can. Right now there is a service billing statement that goes to the foreign entities and there simply is another portion of that statement which has to be billed out in order to arrange the terrestrial links at the other end.

Ferris: So the terrestrial length of the United States would not be done by Comsat.

Mago: No it would not. It would be done by the individual customer.

Ferris: The user would make those arrangements?

Mago: Yes or another carrier.

Ferris: But from the length on the other end?

Mago: It may be either the customer himself who arranges those lengths or it can be done through Comsat.

Brown: I had a question on that, Mr. Chairman, too. This order, then what we've done here, and in our original Spanish International decision, extends Comsat's area of operation on the foreign side to permit it to arrange for the terrestrial side, the terrestrial portion.

Mago: It allows them to make that order. Yes it does.

Brown: Why?

Mago: Because that enables them to offer the service effectively to the customers should the customer choose that.

Brown: But we're not doing it here?

Mago: I'm sorry.

Brown: We're not permitting Comsat to engage in that activity.

Mago: In the U.S. No we're not.

Brown: Why the difference?

Mago: We had determined in the Spanish International Order that it would not be in the public interest for Comsat to have end-to-end service. We specifically stated in that order that they should not be permitted to offer the U.S. terrestrial portion.

Brown: Okay. But what we're saying is that they can handle one end of the service completely. Does that necessarily follow from Spanish International?

Mago: It has to do with Comsat's authorization for service within the United States, in that Comsat was designated in the 62 Act as the carriers' carrier; and so its serv-

ice within the United States, though we have said the television customers could be authorized users for Comsat services, we designated that as authorized use at the INTELSAT earth stations. In the Spanish International order we said that we felt it would go beyond that authorization.

Brown: I thought what we were doing was putting the networks in a position of direct users.

Mago: Yes we did.

Brown: Okay. Does a direct user, before this Ruling, use Comsat at the other end, or does the direct user make its own arrangements for the terrestrial portion?

Mago: Prior to this time the carriers made the arrangements at the foreign end. We were working under the rotational system of carrier-of-the-week and the carrier. . . .

Brown: My question doesn't go to international TV it goes to the general situation of a direct user that is one of the IRCs is a direct user. Does Comsat provide for its terrestrial portion on the far end?

Mago: No.

Brown: Why are we extending that here? I thought we were putting the TV networks in the same position as direct users, that is the IRCs. But in fact what we're doing is extending it at the foreign end. Why?

Mago: Because its a minor change in the situation, Commissioner.

Ferris: Would it tariffed by Comsat? I mean would Comsat then have a part of their tariff a terrestrial link in the foreign country?

Mago: No, that's paid to the foreign government.

Ferris: But there is no add-on charge but they are actually making those arrangements for the terrestrial length in the foreign country?

Verveer: I hope someone here will correct if I am wrong about this but I think that essentially what Jane is saying is that Comsat would be in the same position as our IRCs or AT&T would be in terms of the offering of the television transmission service, and I think that they should be conceived of as to the foreign links as essentially just order

takers. I think they take the orders and pass them on to their foreign correspondents overseas. Is that correct?

Mago: Yes.

Ferris: But the assurance of any tariffing over and above the actual cost for that terrestrial link to be handled in any tariffing arrangements for this or going to be considered separately?

Verveer: Mr. Chairman, I think the charges as to the foreign link are essentially set by the foreign administration.

Ferris: And there will be no additional charge for Comsat to the user here in the United States for making that arrangement?

Mago: The statement that was in the order was that there would be no additional charge.

Ferris: There would be no additional charge.

Mago: And that the service that they would be performing here is a minor bookkeeping service to fill in one more portion of an order form.

Brown: Okay.

Mago: Therefore, after consideration of all of the arguments that have been raised in the context of the file I-P-C-50, we have determined the public interest would be served by the grant of that authority. The second item that is before you gives authority to the carriers to end the rotational service arrangement for international television service. We've ended this arrangement not only in the Atlantic basin, but also in the Pacific basin in the Caribbean. Again, this is to encourage the competition which we determined was in the public interest in the Spanish International Network order. Accordingly, the Bureau believes that the adoption of both of these items will serve the public interest and implement the policies that we had adopted in the Spanish International Network.

Washburn: I think its an excellent pair of items and I suppose there is no point in asking why it took as long as it did.

Don't answer that.

Fogarty: What will the impact be do you think economically by the adoption of these items on the IRCS?

Mago: Commissioner, as we said in the item, we feel that there are two possible impacts. One would be that the IRCs would be unable to compete for the television customers for this service, in which case they would lose less than one percent of their international traffic. The other option, Commissioner, is that the IRCs may be able to add value to the basic service which Comsat offers in terms of offering monitoring services for the full end-to-end arrangement, in which case they would be able to compete for the service and remain in the market.

Brown: The item also indicates that this represents less than one percent or about one percent of the IRC traffic so it's not a matter of if it goes alternative one in terms of their losing the business, it's not a massive impact kind of situation.

Fogarty: I followed very closely the dialogue you had with Commissioner Brown and the Chairman. As I understand the present arrangement, the IRCs provide end-to-end service and tariff the entire service. Is that correct?

Mago: Yes.

Fogarty: Now under this provision of this order, Comsat would only tariff the land line connection here in the United States plus the overseas service, but would not tariff the foreign connection.

Mago: Technically, Commissioner, the international television circuits are sold in half circuits. Comsat effectively is providing to the carrier the space segment service up to the satellite. At that point, it comes from the satellite to the foreign earth station and then those terrestrial links are all by a set price by the foreign government. The arrangements are made by the carriers or by Comsat in this particular arrangement but there is no additional cost to the carrier or to Comsat.

Fogarty: How is that cost passed on to the network? The cost of the foreign half of the service? Is that billed directly?

Mago: There is different arrangements for that. Comsat proposed in theirs to follow the CCITT recommendation E330.

Fogarty: Which is what?

Mago: Which is a reciprocal billing arrangement in that they would collect from the American user the cost of the entire transmission and transmit to the foreign government their half of the cost. And the same would be done on the other side, that the foreign government would collect the entire cost and then transmit half to Comsat.

Ferris: I don't think, that the domestic terrestrial link is not going to be billed by Comsat.

Mago: No that would.

Ferris: That would be arranged by the networks themselves.

Fogarty: By some private line arrangement or whatever with AT&T or specialized carrier.

Ferris: It's just the space hop and then an add-on of just the out of pocket costs for the terrestrial links on the foreign end. That's what the networks would pay to Comsat who would forward it. The terrestrial domestically would be arranged by the user here.

Fogarty: I only had one other point. When we consider the GTE Telenet acquisition, I didn't realize that our attention was directed to how onerous the conditions were and whether or not we ought to relieve GTE of some of the burden that we originally proposed. However, I just found out yesterday in paragraph 49 of that order, we turned down GTE's request for an extension of their 214 for Telenet, in order to provide Telenet with the opportunity to bargain with the Europeans. If I'd known that, I would have objected to it, and I see that we are going to do the same thing in Item 7 today and I am going to object to that. I think the Court in that ITT Second Circuit case misinterpreted the act, frankly, because if we gave GTE Telenet or Graphnet perpetual 214 it wouldn't in any way inhibit some other carrier from coming in to offer that service. So I think we made a mistake in that order and I think the court misconstrued the act.

Verveer: Commissioner, I certainly am inclined to the view that you just stated that perhaps the Commission should not have conditioned the authorizations, and I think, although it was otherwise just an extraordinarily fine opinion, my suspicion is and I guess I defer to Nina for a better

description of it, my suspicion is that the Commission was a little bit I would quarrel with the Court on the economics of its opinion that is this thought that you have overhanging the market that these potential entrants and that others are going to be deterred from entry because of that. Because, all the Court really was describing, I think, is the conventional economic situation in this country where there are no legal entry barriers.

Fogarty: Well I don't recall that we ever discussed that paragraph 49 and if we did I'm sorry that I missed it. I think we should have extended the authority to GTE Telenet, and the Chairman well knows we are going to London in a couple of weeks to discuss with the European entities the question of allowing our value added carriers and specialized carriers to do business in Europe. And what I'm afraid of is that if we adopt this Item No. 7 today, and refuse to grant the extension of 214 it might be a signal to the European entities that we don't really mean business.

Verveer: Commissioner, there are two possibilities that I had intended to mention when we got to Item 7. One very important fact is that I think before the Telecommunications Committee goes to England for these discussions you will have an opportunity to pass upon a rather broader application which Graphnet has filed to offer the totality of its services on an international basis, and I think it's important

...

Ferris: Which would embrace this particular ...

Verveer: It would embrace the fax service and all their other services. And I think it's important, that obviously I wouldn't want to prejudge what decision the Commission will make when it considers that matter but I think it would be a mistake to interpret the Commission's action if it should follow our recommendation today as being any dramatic backing away from the Commission's commitment to the idea that essentially our rate payers are better served by as many services and carriers as possible being available in the marketplace.

Ferris: Rather than deciding 7 now and with the policy implications that have been raised and the questions about the whole conditional process, I was going to recommend to

the Commission that when 7 comes up that we grant an extension of two or three months in that case solely on the basis is we are disposing of the extension orders three or four days prior to the expiration of the original time and on the basis of we should have disposed of it, earlier grant at least an extension of that basis [sic]. I think it might satisfy the Court, too, from the standpoint of breathing somewhat down our neck with respect to what status is coming in Graphnet and if in that two or three month period, we take up something of a more generic nature dealing with these conditions, as I think it might solve all the policy implications that are raised by Commissioner Fogarty, and which you seem to agree with.

Fogarty: In those circumstances, I think that's the correct way to ...

Brown: I'm inclined in that direction.

Fogarty: But then we could invite GTE Telenet to file again. I'd like to dispose of them as a package.

Ferris: Would that be included in the ...? Certainly it would be.

Verveer: Commissioner, I suspect that depending upon your disposition of the broader applications for authority that Graphnet has filed that could constitute precedent and indeed an invitation to other carriers to do something similar.

Ferris: On the second part, Jane, the rotational arrangement dealing with in the Pacific basin, now does that mean that these carriers can have a blanket authorization to serve in the Pacific basin.

Mago: Yes, it does.

Ferris: It does. So there's a parallelism between it and the Atlantic basin. There is no country-by-country requirement.

Ferris: The question then is on the adoption of the attached orders implementing the policies discussed and contained therein making it consistent with the Spanish International Network decision with the ... All in favor say aye.

All: Aye.

Ferris: Opposed No. The ayes have it.

Fogarty: I'll concur with a statement.

Ferris: Next item is the Petition of Graphnet for reconsideration of the nine month time limit imposed for concluding operating agreements for authorized facsimile service between the United States and Points 11 Western European countries. This is the item that we already had the discussion on. I would propose on just the grounds that we're coming up to the expiration of the deadline, to extend it for at least a couple of months on that basis alone, and that would afford the opportunity to come up with that more generalized consideration of this too, Phil, without disposing of the policy implications that we discussed earlier in this item, but give us an opportunity, and Graphnet an opportunity not to have any implications drawn from the fact that they lost an authorization.

Verveer: Mr. Chairman, there are a couple of factors that I'd like to point out that may be important. The first is that there is a more generic application that will be before you within a couple of weeks that may resolve this question. The second is, as I understand it, early this year Graphnet did file a 214 application which included an operating agreement with the Phillipines telecommunications administration for all of its services to the Phillipines and beyond and the term "and beyond" is essentially a term of art that means in conjunction with other entities they will be free to serve the world. What I would suggest, Mr. Chairman, is if you feel that you'd like not to in any way cloud or color the issues, perhaps it would be appropriate to give me the authority to grant some sort of short extension on the nine month period, perhaps even shorter than the two months that you proposed, to give the Commission a chance to consider this larger application.

Ferris: That's equally as good. Why don't we then give Phil the authority then to grant a short extension consistent with the plans that we have coming up for a more general consideration. All in favor of that grant of delegated authority to the Chief of the Bureau say Aye.

All: Aye.

Ferris: Opposed No. The Aye's have it. So ordered.

Verveer: Excuse me, Mr. Chairman would that delegation also include the possibility of extending Telenet's authority notwithstanding the GTE Telenet decision.

Ferris: Yes.

Fogarty: That's fine.

Ferris: Okay.

## [EXHIBIT D]

## [Transcript of April 22, 1980, FCC Meeting]

Ferris: The next item is a petition by ITT World Communications Inc. for rulemaking, seeking adoption of rules to govern informal Commission contacts with foreign telecommunications entities. Rulemaking 3523.

Verveer: Mr. Chairman, Dave Bass is going to present this item and he was assisted very substantially in some of the drafting by Joe Ross and Ted Kramer of our Enforcement Division.

Ferris: Mr. Bass.

Mr. Bass: ITT's petition seeks the adoption of rules to govern the Commission's contacts with foreign governments and telecommunications entities. We do have some changes to make in the draft before you now both on our undertaking and at the suggestion of the General Counsel's Office to strike from this order and help it coordinate with the collateral court suit that ITT has filed in the District Court and to also set out more clearly the procedures that will be followed with regard to these conferences in the future.

Ferris: Mr. Bass, why don't you point the microphone at you. Howard in the back room goes crazy trying to pick you up and if you just point it towards you.

Mr. Bass: In general ITT challenges first the Commission's authority to engage in any contacts with foreign telecommunications entities, but alternatively they argue that if you do so engage, you must follow certain rules to prevent the possibilities of prejudgment and *ex parte* influence. The rulemaking they'd like to have the Commission undertake would determine such issues as what topics should be discussed, make some policy statements, to disclaim any intentions to negotiate with foreign entities and to adopt the governing rules which would apply to all such contacts. Specifically, the rules ITT would have the Commission follow would apply a notice and comment procedure before each conference with a foreign telecommunications entity, would also require that such meetings be open, on the record with input from interested parties either in written form or orally. Our draft order concludes that the Com-

mission has not negotiated with foreign telecommunications entities in these conferences, that the Communications Act not only permits but encourages this type of contact and that existing laws including the Commission's own *ex parte* rules already fully protect the rights of interested parties. The draft order would, therefore, deny the petition but would indicate as a matter of Commission discretion, the notice and reporting procedures the Commission would continue to follow with respect to all of these conferences.

Ferris: What are those procedures?

Mr. Bass: Well, they would involve notice beforehand of the meetings themselves with notice of the time and place of the conference, the persons expected to participate, some indication of the topics to be discussed at the session. The meetings themselves would generally be open unless the determination is made that circumstances warrant closure. Following every such session . . .

Ferris: The meetings could be open or closed?

Mr. Bass: They could. It would be within their discretion.

Ferris: The meeting would determine whether it be open or closed. Is that correct?

Mr. Bass: That's correct.

Lee: You're in effect granting ITT's petition, in part then, aren't you?

Bass: Well, we want to make it clear that the procedures that would be followed are a matter of discretion and not a requirement.

Ferris: Okay, it, it's a good item.

Washburn: I had that same feeling Mr. Lee just expressed, denying them on the one hand and then in the last paragraph gratuitously granting the petition, not completely, but you do spell it out pretty completely, and I think that it is complete enough so that it hamstrings the Commission. It would be bound by this in the future and when you might not want to be. For instance, you say if a meeting is closed, we'll keep a verbatim transcript or at least detailed minutes. These documents would be subject to disclosure upon normal Freedom of Information rules.

Ferris: Well, I think that is going to be edited.

Washburn: Well, that obviously is going too far. When you're talking to people in a negotiating stance abroad you don't want to get in that posture or people won't talk to you for one thing. I would eliminate 28 completely or at the very least get rid of that language I just read.

Jones: Can I add 27 to the paragraphs that I think should be deleted.

Lee: And 15.

Washburn: What's 15?

Bruce: I should say that there is a pending challenge to the Commission's role in consultative discussions in Federal District Court and, of course, we have the ITT petition for rulemaking. I think the intention here is to make the process of discussion with foreign entities as open as possible. It's been the Commission's position that these discussions are not for the purpose of negotiating operating agreements or entering into explicit trade-offs with respect to one issue or another. Its extremely important in my mind to the viability of this procedure that it be clear to the fullest extent possible what the subjects of discussion are and what information is gathered and exchanged so that I think in terms of the Commission assuring that this is a viable mechanism to open a dialogue with the international carriers that we do take some steps voluntarily to make those procedures as open as possible. Now, I think that what the intent of the item is to give the Commission some leeway in circumstances where foreign entities might think it...

Lee: I think that that's alright, Bob, with respect to our participation and when you talk about keeping a detailed transcript, you're dictating what the foreign powers will do too and they just ain't gonna like that.

Ferris: There's no need for that verbatim transcript, or minutes of the meetings. What you have specified is exactly what has taken place in the past when there was a meeting that was open, there were observers. When there was a closed meeting, there was a synopsis very similar to the type of ex parte memorandum of the types of conversations that we had domestically that was made public, so that everyone knew exactly what took place after the fact.

There was a prebriefing and I think those should continue and we will. But the idea of having verbatim transcripts. Sometimes the parties from the other side probably wouldn't want to participate in that.

Lee: I realize what you are trying to do but when you recognize the origin of this whole process and I was a part of it (I think it was 1974 at a Maritime Conference) when the French went to great pains to talk to me and their concern was they wanted to meet the guys who made the decision. They just couldn't understand this business where they have a handshake with the carrier and they think everything is all set and we sort of undo it and all they wanted to do was meet really with the Commissioners. At the time they were explicit and said we don't want the rest of the government even. I came back and wrote a memorandum and out of that we couldn't of course throw the rest of the government out but this is the background of this thing. They just wanted informality, and I think by this formal requirement of a transcript you would destroy their incentive for continuing what seems to be a very good thing.

Bruce: I think the key is that to the extent possible that we develop an adequate record of the discussions and that may not always mean that it be a verbatim transcript. I think it has been the case in some of the consultative meetings on facilities that verbatim transcripts have been maintained and there may be some circumstances where that's useful or appropriate depending on the subject of the discussion. I think it is useful to be explicit that we intend to utilize procedural protections that are appropriate in different contexts.

Jones: My problem with it is certainly not ... I mean that's right I think we want to make as much of all of these meetings open and available to everyone as we can, but I am concerned with in 27 and 28, we tie our hands and that we have to do it and then there will be times when I think not only would it be undesirable as far as the foreign entities are concerned, but there may things that are said that indeed for a variety of reasons should not be made public;

and I think we should retain the discretion to be able to do that. This seems to give away too much.

Bruce: Well I think the intention of the item is that I think the key is that we use those procedural protections that are appropriate for the particular discussions that are being carried out and obviously if the subject of discussion might reach a pending application or a pending matter, it might be useful to develop a more complete record to include in that docket. So I think our only concern is that the Commission make clear its general intention to the maximum step possible make this process an open one and make it an accountable one. And because it is an extremely important mechanism for the Commission to explain these evolving policies in the international area to foreign entities so that they are hearing it directly and not simply reading about it.

Washburn: But if you spell this out, what you've just said, in too great a detail and say here's what we're going to do, verbatim transcripts or full minutes, you're going to destroy the value of the whole exercise. So its a trade-off with what you want to do from the legal aspect and the reality of having this process work.

Bruce: Well, Commissioner, I agree. I think there will be some circumstances where it isn't necessary or even appropriate to retain a verbatim transcript. There may be certain kinds of discussions ...

Washburn: This says there will be one, or very full minutes, and I think it ought to be out. In fact, I'd kick out the whole paragraph.

Bruce: Well I think we feel from the litigation and a public policy standpoint that it's very important that we ...

Fogarty: But, Bob, I tend to agree with both Commissioner Jones and Commissioner Washburn. The part of paragraph 28 which disturbed me is these documents would be subject to disclosure under normal Freedom of Information rules. That all seems to declare a policy of the Commission to surrender the documents. It may very well be that we have exceptions under the Freedom of Information by which we can retain those documents. I think 28 has to be

either eliminated or if you want it because of the litigation it has to be redone because I think it goes too far for me.

Bruce: Well, I agree with that. I think the key point is that we make the discretionary aspect of these measures should be made clear and there are circumstances . . .

Jones: When you say the discretionary, do you mean discretionary in each instance. That does not come across. I mean it sounds as though we now as a matter of discretion declare this to be our future policy in all cases. If what you're saying is, that if the circumstances of a particular meeting are such that we can make it public it will be our general policy to make as much public as we can. I got the impression that was a general policy.

Bruce: I think that you stated it.

Lee: It's as far as I would go, if the Commission felt they really had to go down this route, it seems to me that you are committing foreign administrations to something that they may not agree to. I wouldn't object to having this very subject on an agenda of one of these meetings to see what they would be willing to bargain.

Fogarty: We can't say to a foreign administration that everything you say in this room we are going to give to the press if they ask for it. You just can't do that. They won't talk with you after that.

Brown: I suspect that that becomes a foreign policy question, doesn't it, within the intendment of the document.

Bruce: No.

Brown: That was a serious question because I think part of our problem is that this is a very carefully drafted paragraph and it has a lot of escape clauses that aren't obvious.

Bruce: I think it needs to be more carefully qualified along the lines that Commissioner Jones has suggested, to indicate that different steps will be appropriate in different circumstances. And I think certainly to clarify the implication that verbatim transcripts are obligatory in all circumstances, or that all the documents necessarily are going to be disclosable generally to the public. I think the intent of the paragraph was to indicate a general concern to afford the maximum procedural safeguards that are appropriate.

Lee: I know what your problem is. I appreciate that. Maybe you'd want to say something about we'd have agreement with our foreign counterparts anytime we affected a procedure like this.

Bruce: I think there's been some language on this paragraph that the Bureau and our office has been working on that I think tries to ...

Washburn: Why do we have to address this here, Mr. Chairman. Why can't we get at it in some other context. Let's get rid of this item without addressing this matter at this point.

Bruce: Commissioner Washburn, I think it's probably useful that we deal with this petition at this time because of the pending litigation in the District Court.

Washburn: Well if that paragraph is in there as it stands I'm going to dissent.

Jones: I get the feeling from Mr. Bruce that maybe the thrust is going to be changed.

Bruce: I think there is a redraft of the language that has been worked out.

Washburn: Well then let's, Mr. Chairman, send this back and look at it another day.

Bruce: Commissioner, we have some litigation ...

Ferris: Why don't you redo this paragraph 28 and recirculate this.

Verveer: The paragraph is effectively redone. Our litigation people have worked with the Bureau and its just a matter of almost reading the language at this point ...

Fogarty: It makes it kind of tough on us, you know.

Bruce: Well we can if the thing has to wait ...

Ferris: Why don't we circulate it this afternoon. I think to a great extent its much to do about nothing. After the other three items today, there's not going to be much left to talk about at consultative meetings and so I don't think; I think we are making a big procedural harangue about something that, if those rulemakings that we put out are lawfully adopted I think an awful lot of the discussion is going to change. I think we can correct that and circulate it, particularly ...

Verveer: Mr. Chairman we'd be happy to do that. I'd like to add that I think Commissioner Brown's comment about paragraph 15 is well taken and we'll delete that as well.

Ferris: Alright.

Washburn: So this will come around the first thing in the morning.

Jones: Since we have used the expression many times of how the *ex parte* rework . . .

Bruce: We were going to put it on. Basically, we're ready to bring it forth for discussion this week and we thought that the Commission was sufficiently burdened by the items that were scheduled for today and next week. It will be on the next meeting. It's ready to go.

Ferris: We'll expect that rework language to come around this afternoon or tomorrow morning.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS INC., PLAINTIFF,  
*v.*

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT AND IN OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

\* \* \*

ITT Worldcom believes itself entitled to summary judgment on its Third Claim for Relief. It asks the Court to rely solely on the following statements of FCC representatives as to what they are doing, so there can be no suggestion that there is any material issue of fact as to whether the FCC is engaged in the "conduct or disposition of official agency business" when it meets with European administrations to discuss their dealings with new carriers:

1. *Decisions by the Full Commission.*

A. "The Commission, along with other authorized governmental agencies, attends these conferences to share and exchange points of view regarding future international telecommunications planning. *The Commission must attend such conferences in order to discharge its non-delegable duty to authorize international wire and radio communications in the public interest* (See Titles II and III of the Communications Act of 1934, as amended, 47 U.S.C. Titles II and III and the Communications Satellite Act of 1962, 47 U.S.C. § 701-744) and to regulate 'inter-state and foreign commerce in communications so as to make available ... to all the people of the United States a rapid, efficient ... world-wide wire and radio communications service with adequate facilities at reasonable charges ...' 47 U.S.C. § 151...."

*In re ITT World Communications Inc. Request for Inspection of Records*, FCC 80-78 15644, Order Denying Application for Review at 4-5 (emphasis added), attached to Defendant's Memorandum as Exhibit E.

B. “[W]e have undertaken to have Commission representatives meet face-to-face with them [foreign governments] to discuss mutual present and future telecommunications needs and the policies which will best serve them . . . [T]he process may result in a cooperative telecommunications climate between the countries involved which should significantly enhance the prospect for foreign acceptance of previously authorized services and services that may be licensed in the future. *To the extent that these informal discussions can advance our progress toward realization of statutory goals, they are a necessary and natural corollary of our international licensing authority.*”

*In re Petition of ITT World Communications Inc.*, FCC 80-29 27296, Order Denying Petition, released May 2, 1980 at 9 (emphasis supplied), attached to Defendant's Memorandum as Exhibit A.

## 2. *Statements by FCC Commissioners.*

### A. *Commissioner Fogarty:*

(i) “Now, I believe that the Commission, as I said, has already gone a long way toward meeting the requirements, needs and necessities, as our foreign correspondents see it.

And I would hope, that as we have deferred, in our recent decisions, to your needs, as you see them, that you would give us the “tit” for the “tat”; in other words, if you would recognize our competitive policies, and that your agreements would deal with our requirement for multiplicity of carriers in this competitive arena.

\* \* \* \* \*

*I think the Commission—I can speak for myself and, I'm sure, for the Chairman, and Mr. Lee, and for the other commissioners who are not present—we want to meet you half way but we do request, I think, that the quid pro quo would be that you recognize that we are trying*

to promote competition in the United States, and that competition spreads abroad, and that you would meet our specialized common carriers, and that you would agree to deal directly with them.

Transcript of meeting held in Montreal, March 22, 1979, at 8-9 (emphasis supplied), attached to Defendant's Answer as Exhibit B.

(ii) “[T]he Chairman well knows *we are going to London in a couple of weeks to discuss with the European entities the question of allowing our value added carriers and specialized carriers to do business in Europe.* And what I'm afraid of is that if we adopt this Item No. 7 today, and refuse to grant the extension of 214 *it might be a signal to the European entities that we don't really mean business.*”

Transcript of FCC Open Meeting, February 8, 1980 at 9-10 (emphasis added), attached to Lewis Affidavit as Exhibit C.

B. *Commissioner Washburn:*

*“When you’re talking to people in a negotiating stance abroad you don’t want to get in that posture or people won’t talk to you for one thing.*

C. *Commissioner Lee:*

*“... [I]f the Commission felt they really had to go down this route, it seems to me that you are committing foreign administrations to something that they may not agree to. I wouldn’t object to having this very subject on an agenda of one of these meetings to see what they would be willing to bargain.”*

Comments of Commissioners Washburn and Lee, Transcript of FCC meeting, April 22, 1980, at 2, 5 (emphasis added), attached to Lewis Affidavit as Exhibit D.

D. *Chairman Ferris:*

*“I think the leverage that we presently have at the FCC lies in the authorization of facilities. We have these [European] entities sitting around a common table and they want very much for the FCC to listen to them and to be sympathetic to their authorization requests.*

*I think it would be very, very germane in those meetings to put on the agenda the notion that we have some little entities that don't want facilities, but they want to offer services.*

I think comity is a two-way street. We give to European entities in our forum the same consideration from the standpoint of our decisionmaking as they give to us.

And when we have authorized a carrier, we would expect them to be sympathetic to giving that carrier some sort of correspondent relationship.

I think the present situation, although it is not tidy and not crisp, does lead to a very thorough analysis of the criteria which should be used for international planning facilities. And it does look toward what the rate payer is going to pay.

I think it gives us leverage in international planning that could bring a greater sense of urgency to our correspondents overseas so that they will give due consideration to the competitive environment... [we] have in the United States."

\* \* \* \* \*

Senator Hollings. *"On the leverage of the FCC with these foreign entities, have you discussed this situation with any of the foreign entities?*

Mr. Ferris. *It was raised in the Montreal meeting on the consultative process. The question of correspondent relations was actually discussed briefly at the meeting. And the very fact that it was raised, I think, makes the point very tellingly with respect to how the process works.*

Comments of FCC Chairman Ferris, Hearings before the Subcommittee on Communications, Senate Committee on Commerce, Science and Transportation, May 9, 1979 at 1578, 1586 (emphasis added).

### 3. *Statements by FCC Staff.*

#### A. *Robert Bruce, FCC General Counsel:*

*"A very significant achievement would be to identify the different approaches being used by the different parties, to narrow differ-*

ences, and to move toward consensus. It would be useful to identify and understand areas of disagreement as well as to reach agreement on common principles and approaches.

\* \* \* \* \*

We recognize that there has been concern about seemingly unilateral decision-making by the United States in the area of facilities planning. An effective consultative process should ameliorate this concern. On the other hand, we are concerned about the difficulties involved in reaching agreement on the implementation of new overseas service arrangements. *The consultative process may provide a mechanism for increasing cooperation in this area.*

[T]he exact nature of a consultative process and its integration into the domestic procedures in the U.S. and elsewhere will require further detailed studies.

Telex of FCC General Counsel Robert Bruce, March 20, 1979, at 3-4, 9-11 (emphasis supplied), attached to Defendant's Answer as Exhibit A.

B. *Philip L. Verveer, Chief, Common Carrier Bureau*

By design, the [Dublin] meeting was attended solely by agency representatives of the United States and various foreign governments ... The documents were generated to aid the Commission in construction of future international policy and contain FCC staff recollection of statements or representations of policy of foreign sovereigns. It is imperative that the Commission be able to engage in the free flow of information between other agencies of the U.S. Government and foreign governments in order to set intelligent and workable international telecommunications policies. . . .

\* \* \* \* \*

[The closed meetings provide] a critical avenue by which the United States gains insight into the status of foreign governments' telecommunications policies and by which information on mutual vital

interests is exchanged . . . *The entire purpose of having such meetings [is] to allow for a meaningful dialogue on matters of international scope...*

Letter of Philip L. Verveer, Chief, Common Carrier Bureau to Grant S. Lewis, dated November 16, 1979, denying, in part, ITT Worldcom's FOIA request, at 3, 4 (attached to Defendant's Memorandum as Exhibit C) (emphasis supplied)

\* \* \*

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS INC. PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

[FILED JULY 28, 1980]

**STATEMENT OF MATERIAL FACTS IN SUPPORT OF  
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT PUR-  
SUANT TO LOCAL RULE 1-9(h)**

Plaintiff, ITT Worldcom submits the following Statement of Facts In Support Of Its Motion For Summary Judgment on its Second and Third Claims for Relief, as required by Local Rule 1-9(h). The documents referred to in this statement are the following: Defendant's Answer and exhibits attached thereto ("Answer" and "Exhibits to Answer"); Affidavit of Grant S. Lewis and exhibits attached thereto ("Lewis Affidavit" and "Affidavit Exhibits"); Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment and in Opposition to Defendant's Motion to Dismiss and Motion for Summary Judgment ("Plaintiff's Memorandum"); Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss, Or, in the Alternative, For Summary Judgment ("Defendant's Memorandum").

Plaintiff contends that there are no material facts as to which there exists a genuine issue to be tried, and that the following facts establish that plaintiff is entitled to judgment in its favor as a matter of law on its second and third claims for relief:

*Second Claim for Relief:*

1. On October 12, 1979, ITT World Communications Inc. ("ITT Worldcom") submitted to the Federal Communications Commission ("FCC"), a Freedom of Information Act ("FOIA") request. A copy of ITT Worldcom's request is attached to the Lewis Affidavit as Exhibit A.

2. On November 16, 1979, the FCC responded to ITT Worldcom's request, denying, in part, access to the requested documents. A true copy of the letter denying ITT Worldcom's request is attached to Defendant's Memorandum as Exhibit C.

3. On December 17, 1979, ITT Worldcom filed an Application for Review of the FCC's Freedom of Information action. A copy of ITT Worldcom's Application for Review is attached to Defendant's Memorandum as Exhibit D. ITT Worldcom filed a supplement to its Application for Review on December 26, 1979. At the time that ITT Worldcom filed the complaint in this action, the FCC's time to make a determination on the Application for Review had expired and it had not done so.

4. On February 14, 1980, the FCC adopted an Order substantially denying ITT Worldcom's Application for Review. The text of the order was released on February 20, 1980. A true copy of the Memorandum Opinion and Order released by the FCC is attached to Defendant's Memorandum as Exhibit E.

#### *Third Claim for Relief*

1. In October, 1979, members of the FCC Telecommunications Committee and other FCC representatives met with representatives of European telecommunications administrations and carriers in Dublin, Ireland. ITT Worldcom and the other American international record carriers were excluded from this meeting, and no transcript was made available.

2. On February 20-21, 1980, the Telecommunications Committee of the FCC and other FCC representatives again conducted a closed and off-the-record meeting in Ascot, England with representatives of European administrations and carriers. ITT Worldcom and other American international record carriers were excluded from this meeting, and no transcript was made available.

3. The FCC contends that the Government in the Sunshine Act ("Sunshine Act"), 5 U.S.C. Section 552b, does not apply to meetings such as occurred in Dublin and Ascot, and has made no effort to comply with its terms. Set forth at pp. 7-11 of Plaintiff's Memorandum are true copies of

statements made by the FCC and its representatives at, or with respect to, their meetings.

Dated: Washington, D.C. June 28, 1980

LEBOEUF, LAMB, LEIBY & MACRAE

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT.

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S  
STATEMENT OF MATERIAL FACTS**

Defendant, Federal Communications Commission, by its undersigned attorneys, hereby states that there are no material facts in dispute in this case. Without admitting the materiality of the factual assertions, defendant responds in opposition to the paragraphs of plaintiff's Statement of Material Facts as follows:

**SECOND CLAIM FOR RELIEF**

1. No objection.
2. No objection.
3. No objection except to aver that the characterization of the time for defendant's determination of the application for review is a legal conclusion not requiring a response.
4. No objection.

**THIRD CLAIM FOR RELIEF**

1. No objection.
2. No objection.
3. The assertions obtained in the first sentence are conclusions of law and not assertions of fact requiring a response. Defendant has no objection to the assertions contained in the second sentence.

RESPECTFULLY SUBMITTED,

ALICE DANIEL

*Assistant Attorney General  
Civil Division*

CHARLES F. C. RUFF

*United States Attorney*

/s/

VINCENT M. GARVEY

/S/

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/S/

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*Counsel*

FEDERAL COMMUNICATIONS  
COMMISSION  
Washington, D.C. 20554

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-0428

ITT WORLD COMMUNICATIONS, INC., PLAINTIFF,

v.

FEDERAL COMMUNICATIONS COMMISSION

## AFFIDAVIT OF COMMISSIONER ROBERT E. LEE

1. I am one of the three members of the seven-member Federal Communications Commission who has participated in previous international "Consultative Process" conferences and am scheduled to attend the next conference set for October 30-31 in Madrid, Spain.

2. Although travelling in my official capacity, both I and my fellow Commissioners fully understood that attendance at such conferences was limited to participating in a dialogue on matters of mutual concern and explaining to other participants my personal view of the nature of recent United States activities regarding new services and carriers in the international telecommunications field.

3. At no time prior to, during, or after attendance at such conferences have I been authorized, nor did I believe myself or other attending Commissioners to be authorized to (1) jointly deliberate on any Commission business at such meetings, (2) take any action on behalf of the Commission at such meetings, (3) submit to the Commission joint recommendations based on my experiences or agree at such meetings with other Commissioners as to subsequent agency actions or deliberations, (4) make any preliminary or other decisions on behalf of the Commission at such meetings, (5) conduct any hearings at such meetings on behalf of the agency, (6) participate in any vote or other joint action with any attending Commissioner on matters arising at such meetings, (7) reach any agreement with any other party on matters arising at such discussions, (8) bind or attempt to bind any party attending such discussions to any particular view, (9) seek to have the participants in such conference agree to make any recommendations or take any

specific actions regarding any particular telecommunications policies, (10) commit myself to any action either at such discussions or in the future, or (11) take any other action inconsistent with my understanding that my participation in such conferences was wholly in furtherance of the broad, informal, and clarifying exposition and receipt of views on international telecommunications matters.

4. Finally, based on my personal experience of 27 years as an FCC Commissioner, cancellation of the upcoming meeting in Madrid, Spain will have a deleterious effect on a mutual understanding of international telecommunications concerns. And, because the European attendees are arms of their governments and—unlike the individual Commissioners—might be viewed as speaking with final authority for their countries, the Europeans have consistently indicated that with respect to certain international telecommunications issues, "Consultative Process" meetings should not be open to the public.

/S/

ROBERT E. LEE

[dated October 23, 1980]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-2324

ITT WORLD COMMUNICATIONS, INC.  
PLAINTIFF-APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION,  
DEFENDANT-APPELLANT

I, Willard L. Demory being duly sworn depose and say:

1. I am Assistant Bureau Chief — International — Common Carrier Bureau, Federal Communications Commission. In that capacity, I oversee the Commission's participation in "Consultative Process" conferences with representatives of communications administrations in other countries. I organize and coordinate these meetings and have also overseen the Commission's efforts to expand the CP dialogue to include discussions of non-facilities communications issues. I attended the meetings in Madrid, Spain, on October 30-31, 1980.

2. The Madrid meetings were taped pursuant to the Court's order of October 24, 1980. The Commission had agreed to the taping requirement as part of its effort to secure a stay of the Court's earlier (October 17th) order, which required that the meetings be opened to the public.

3. There is no question that the requirement that these meetings be made public has inhibited and will continue to inhibit the FCC from maintaining a dialogue with foreign telecommunications administrations on matters of mutual interest. At the meeting in Madrid on October 30-31, the European participants expressed great concern about the U.S. court action and the fact that the meeting was being taped. They told us that they would be unable to engage in the kind of candid exchange of information and views regarding non-facilities topics which the FCC had contemplated, as long as the discussions were tape-recorded or open to the public. My impression was that some of the Europeans might not object to opening the meetings to certain of the private carriers. All seemed to object, however, to

opening the meetings to *all* the carriers or to the general public.

4. The Madrid meeting itself was far less useful than had been anticipated because it was being taped. The Europeans refrained from offering opinions about the U.S. pro-competitive policies which were to have been discussed, and confined themselves instead to listening to the U.S. statement of position. The sense of constraint at the meeting was in marked contrast to the much more vigorous discussion which had taken place at a similar meeting in Ascot, England, some months earlier (which I also attended).

5. The Europeans are anxious to resume the discussions if the informal nature of the sessions can be guaranteed. They are also willing to discuss the issues "formally"—i.e., publicly—but meetings of this type would be highly structured and would prevent a candid exchange of information and opinion. In "formal" meetings, the Europeans and Canadians could only advance the views approved by their administrations. When meetings are informal, we are more likely to receive candid opinions from technical people and businessmen which can give us a clearer understanding of interests and concerns. If the meetings are to be truly useful in providing a vigorous exchange of views, the Madrid meeting made it clear that they must be off the record.

6. The Court's order, and the European reaction to it, have discouraged us from doing anything further to encourage informal communications. But for the order, we would now be in the process of planning for future meetings with the Europeans on non-facilities issues. Indeed, if the order had not existed, we would have discussed future meeting dates with the European participants at the close of the Madrid sessions. We have not been able to plan other meetings, however—and there was no discussion of future meeting dates in Madrid—because of the uncertainties created by the ruling.

7. If the ruling stays in place for a year or more (which I understand is the length of time it would normally take for this case to be decided on appeal), the delay would create a loss of momentum that could halt the talks altogether. We initiated these discussions and it is only recently that the

European administrations have indicated an interest in exploring the issues with us. It is important that we be in a position now to follow up by scheduling more meetings.

8. Representatives of the European administrations with whom I have dealt value their ability to discuss telecommunications policy issues with FCC Commissioners and staff. The European bodies function as operating as well as policy-making bodies. While the FCC is not an operating body itself, the Commission does have expertise about operations problems. The Europeans appreciate the opportunity to communicate with us directly and prefer this to discussing technical communications matters through diplomatic channels. In my opinion, the District Court's order will limit this direct contact and will have a decidedly negative impact on our relations with foreign administrations.

9. The Commission also wishes to schedule exploratory talks with representatives from Japan, and Australia to discuss whether or not a consultative process should be established in the Pacific Region. Such talks had been planned for early December of 1980 but were cancelled, and we wish to be free to reschedule them within the near future. The existence of the District Court's order has interrupted our plans in this area, as well as our plans regarding the consultative dialogue already established in Europe. Accordingly, we need a stay of the order as soon as possible.

/S/

WILLARD L. DEMORY

[Dated February 13, 1981]

**Supreme Court of the United States**

No. 83-371

**FEDERAL COMMUNICATIONS COMMISSION, ET AL.,  
PETITIONERS,**

*v.*

**ITT WORLD COMMUNICATIONS, INC., ET AL.**

**ORDER ALLOWING CERTIORARI.** Filed *October 31, 1983.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the District of Columbia Circuit* is granted.